

Students' Companion, Series No. 4.

THE INDIAN LAW OF EVIDENCE.

Being an Analytical and Explanatory comments on
THE INDIAN EVIDENCE ACT (1 of 1872)

FOR STUDENTS.

FIFTH & REVISED EDITION.

BY

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PREFACE TO THE FIFTH EDITION.

In the following pages an attempt has been made to help the students of law in their study of the Indian Evidence Act (I of 1872) which has always been considered to be a very perplexing subject to the beginners. No pains have been spared to render the work as excellent as possible and it is earnestly believed that a careful study of this little book *alone* will enable the students to tackle any question that may be set at an examination and will also impart to them a sound knowledge of the law on the subject.

In the preparation of this book, the Author has received much valuable assistance from the works of Taylor, Best, Stephen, Woodroff, Cunningham, Norton, Sarkar and Field, to all of whom he feels greatly indebted.

The promptitude with which four editions of the book have been sold away shows that the book has proved satisfactory to those for whom it was intended. In this edition, the book has been thoroughly revised and brought up-to-date.

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Additional Questions.

1. Explain relevancy of evidence giving examples. **O. U. 1929 (a)** [See pp. 21—22, 29, 47 *et. seq.*]
2. Discuss (i) admissibility of secondary evidence giving examples, and (ii) admissibility in evidence of admissions by parties. **O. U. 1929 (a)** [See p. 201 *et. seq.* and p. 95 *et. seq.*].
3. Discuss the rule as to the exclusion of oral evidence to contradict, vary, add to or subtract from the terms of a written document and its exceptions. **O. U. 1929 (a)** [See p. 233 *et. seq.*]
4. State the doctrine of estoppel and discuss the principle underlying the doctrine with reference to a leading case on the point. **O. U. 1929 (a)** [See p. 275 *et. seq.*]
5. Discuss the penalty imposed on cross examining lawyers for asking questions without reasonable grounds. **O. U. 1929 (a)** [See S. 150 at p. 318].

THE Indian Law of Evidence.

GENERAL INTRODUCTION.

What is Evidence.—The word 'evidence' is derived from the Latin word '*evidens*,' or '*evidere*' which means "to show clearly, to make clear to the sight, to discover clearly, to make plainly certain, to ascertain, to prove." "Evidence," says Blackstone, "signifies that which demonstrates, makes clear, or ascertains the truth of the very fact or point in issue, either on the one side or on the other." "The word evidence," says Taylor, "includes all the legal means, exclusive of mere argument, which tend to prove or disprove any matter of fact, the truth of which is submitted to judicial investigation."

Nature and Scope of Law of Evidence.—All laws may be sub-divided into (1) *Substantive Law**, by which rights, duties and liabilities are defined, and (2) *Adjective Law*†, which defines the procedure by which the substantive law is applied to particular cases in practice. Rules of *procedure*, rules of *pleading*, and rules of *evidence* all fall under the head of Adjective Law. The Law of Evidence is that part of the Adjective Law, which, with a view to ascertain individual rights and liabilities in particular cases, decides ;—

I. What facts may, and what may not, be proved in such cases.

* E. G. Transfer of Property Act, Indian Contract Act, Specific Relief Act, Indian Succession Act, Indian Peral Code.

† E. G. Civil Procedure Code, Criminal Procedure Code, Indian Evidence Act.

II. What sort of evidence must be given of a fact which may be proved.

III. By whom and in what manner the evidence must be produced by which any fact is to be proved.

Write a short note on the necessity and utility of rules of judicial evidence.
C. U. 1928(b).

Use of Law of Evidence — The functions of a Court of Justice are twofold, *viz.*, *first*, to ascertain the existence or non-existence of certain facts; *secondly*, to apply the *substantive* law to ascertained facts and declare the rights or liabilities of parties in so far as they are affected by such facts. For example, in a criminal trial it must first be ascertained whether the accused committed certain acts or was guilty of certain omissions; and if it be shown that he did commit such acts or was guilty of such omissions the Court proceeds to annex the legal consequence, *viz.*, declare him liable to a certain punishment. In a civil trial, in the same manner, the Court has first to ascertain whether the parties did certain acts or whether a certain state of things exists, as, for instance, whether the defendants executed a certain bond in favor of the plaintiff, or whether the plaintiff is the legitimate son of a certain person, and therefore rightful heir to certain property which he claims under the law of inheritance; or whether a certain house is out of repair, in respect of which damages are claimed from a tenant who has covenanted to keep it in repair, or whether a certain stream is fordable which separates accreted soil from the plaintiff's estate. The execution or non execution of the bond, the state of repair or non-repair of the house having been established, the Court annexes the legal consequence, *viz.*, declares the defendant liable to pay or not to pay certain amount of money. The fact of legitimate sonship, or the fordability or non-fordability of the river being proved or disproved the Court declares that the plaintiff has or has not a right to the possession of certain property. If the facts of such case were undisputed, if there was no contention as to whether certain acts had been committed,

GENERAL INTRODUCTION.

or as to whether or not a certain state of things existed, the Court would merely have to apply the substantive law and to declare the consequences resulting from such application—a duty which, though it might occasionally present some difficulty, would in the great majority of cases be sufficiently simple. But men, through misinformations, mistake, misunderstanding and human imperfection, and occasionally from less excusable causes, seldom admit or are agreed about the *facts*; and the Court, before it can apply the *substantive* law, has to sift out from a mass of contradiction, misconception, error, often stupidity and sometimes dishonesty, fraud and falsehood the true facts to which the substantive law is to be applied. This means whereby the Court informs itself of the existence of these facts is called Evidence. Unless the facts be correctly ascertained, however accurate be the application of the substantive law, the result cannot (except by mere chance) be free from error. The first and most essential step towards a right adjudication is therefore to ascertain the facts correctly. The value of rules which guide and assist in the performance of this duty, must necessarily be very great, and thus we see the importance of the study of the Law of Evidence. (*Field*)

The law of evidence is the most important branch of the adjective law. "It is to legal practice what Logic is to reasoning. Without it trials might be infinitely prolonged, to the great detriment of the public and the vexation and expense of suitors. It is by this that the Judge separates the wheat from the chaff among the mass of facts that are brought before him; decides upon their just and mutual bearing; learns to draw correct inferences from circumstances, and to weigh the value of direct testimony. It is by this guide that he is able to tread his way with comparative safety among the burning ploughshares of perjury, forgery and fraud that beset his footsteps and to rest his judgment

"Rules of evidence are fetters on justice"
Comment.
Bom.
1916 (a)

on a basis of probabilities at least comparatively satisfactory to his own mind," (*Norton*).

What do you understand by Lord Brougham's observation that "the law of evidence is the *lex fori* which governs the Court"?
Bom. 1893.

Law of Evidence is *Lex fori*—The law of evidence applicable in every case is that of the *lex fori* which governs Courts. Whether a witness is competent or not, whether a certain matter requires to be proved by writing or not, whether certain evidence proves a certain fact or not; these and the like questions must be determined by the law of the country, where the question arises, where the remedy is sought to be enforced, and where the court sits to enforce it. (*Per* Lord Brougham in *Bain v. Whitehaven Ry. Co.*, 3H. L. C. 7). That is to say, all matters of evidence are governed by the law of the country in which the proceedings take place and not by the law of the country where the contract was made or in other way, the cause of action arose.

History of the Law of Evidence in India.—Before the passing of the Indian Evidence Act (I of 1872), the law of evidence in India rested in a state of great indefiniteness. "The English rules of evidence were always followed in the Courts established by Royal Charter in the Presidency towns of Calcutta, Madras and Bombay. Such of these rules, as were contained in the Common and Statute Law which prevailed in England before 1726, were introduced by the Charter of the year; some other rules were to be found in subsequent statutes expressly extended to India; while others, again had no greater authority than that of use and custom. In the Courts outside the Presidency towns no complete rules of evidence were ever laid down or introduced by authority. The law on this subject rested in a state of great indefiniteness. In the Full Bench decision of the Calcutta High Court in the case of *Queen v. Khyroolah* (6 W. R. Cr. 21) decided in 1865, it was held that at that time the Mahomedan criminal law including the Mahomedan law of evidence, were no longer the law of the country, and that by the abolition of the Mahomedan law, the law of England

was not established in its place. The Mofussil Courts were thus not required to follow the English law, although they were not debarred from following it where they regarded it as the most equitable. The first Act of the Governor-General in Council which dealt with evidence, strictly so-called, was Act X of 1853, which applied to all the Courts in British India. This was followed by eleven enactments passed at intervals during the next twenty-years which effected various small amendments of the law and applied to the Courts in India several of the reforms in law of evidence made in England. In 1855, an Act was passed for the further improvement of the law of evidence, which contained many provisions applicable to all Courts in British India..... While, therefore within the Presidency towns the English law of evidence was in force, modified by certain Acts of the Indian Legislature, of which Act II of 1855 was the most important, the Mofussil Courts, on the other hand, had down to 1872, hardly any fixed rules of evidence save those contained in Acts XIX of 1853 and II of 1855. Before, and even for sometime after, 1872 the lax character of the evidence in the Mofussil Court was the subject of frequent judicial comment."—(*Woodroff*). In the words of Mr. Field, "the whole of the India Law of Evidence, as it existed before the introduction of the Act of 1872, might have been divided into three portions *viz.*, one portion *settled* by the express enactments of the Legislature, a second portion *settled* by judicial decisions and a third or *unsettled* portion and this by far the largest of the three, which remained to be incorporated with either of the preceding portions". Such being the state of the most important branch of adjective law, formal legislation was considered necessary and in the year 1868, Mr. (afterwards Sir Henry Sumner) Maine prepared a draft Bill of the Law of Evidence. but it was abandoned as not suited to the country. In 1871, Mr. (afterwards Sir James Fitz James) Stephen prepared a new Bill which was passed into law in 1873 as Act I of 1872.

Relation of Indian Evidence Act to English Law of Evidence.—The Indian Evidence Act reduces the English law of evidence in the form of express propositions arranged in their natural order with some modifications rendered necessary by the peculiar circumstances of India. But although mainly drawn on the lines of the English Law of Evidence, there is no reason to suppose that the Act was intended to be a servile copy of it and indeed it does in certain respects differ from English Law. No doubt, cases may frequently occur in India in which considerable assistance is derived from the consideration of the law of England and of other countries, but the Courts have to see how far such law is founded on common sense and on the principles of justice between man and man and may safely afford guidance here. It must not be forgotten that the Indian Evidence Act is a Code which not only defines and amends but also consolidates the Law of Evidence repealing all rules other than those saved by the last portion of its second section ; and the method of construction to be adopted in the case of such a Code is this : "Instead of assuming the English Law of Evidence, and then inquiring what changes the Evidence Act has made in it, the Act should be regarded as containing the scheme of the law, the principles and the application of these principles to the cases of most frequent occurrence : In respect of matters expressly provided for in the Act the Courts must start from the Act and not deal with it as a mere modification of the law of evidence prevailing in England." (4 Cal. 941)

Difference between English and Indian law of Evidence.—The following are the principal points of difference between the English and the Indian law of Evidence :—

Terms of
complaints.

1. In England the particulars of the complaint may not be disclosed by the witnesses for the prosecution, either as original or confirmatory evidence, and the details of the

statement can only be elicited by the prisoner's counsel on cross-examination. Under the Indian Act, [Sec. 8, ills. (j) and (k)] the terms of the complaint are admissible as original evidence.

2. To prove the existence of a conspiracy, or to show that any person was a party to it, a letter giving an account of the conspiracy is admissible under the Indian Act, Sec. 10, even though not written in support of it or in furtherance of it. The contrary rule is followed in England. Evidence of conspiracy.

3. In India, the inducement, etc which renders a confession inadmissible must be one proceeding from a person in authority. (S. 25). In England, it seems enough if the inducement is held out by any one in his presence and he, by his silence, sanctions its being made. Confessions.

4. In India it is necessary to prevent the police from torturing persons in their custody for the purpose of extracting confession. The Evidence Act therefore declares that a confession made to a police officer is absolutely inadmissible (even though no threat be used or false hope held out), and a confession made while in the custody of the police is inadmissible unless made in the immediate presence of a magistrate (Secs. 25 & 26). There is no such exclusion in England.

5. In England, the confession of an accused person is not evidence against any one but himself. Even when A is indicted for receiving stolen goods from B, confession by B that he was guilty of the theft is no evidence of that fact as against A. Under the Evidence Act, however. (Sec. 30), where two persons are being tried jointly for the same offence, a confession by one may be "taken into consideration" as against the other.

6. In England, dying declarations are admissible only in criminal cases 'where the death of the deceased is the subject of the charge, and the circumstances of the death are the subject of the declaration.' In India [Sec. 32 and Dying declarations.

ill. (a)] they are admissible in civil suits as well as in criminal prosecutions for rape or any other offence. In England, to render a dying declaration admissible, the declarant must have been in actual danger of death, he must have been fully aware of this danger, and death must have ensued. In India the statement is relevant, whether the person who made it was or was not, at the time when it was made, 'under expectation of death'

Entries in
course of
business.

7. In England to make entries in the course of business admissible, they must be shown to have been made contemporaneously with the acts to which they relate. The Evidence Act (Sec. 32, cl 2) contains no such restriction. In England such entries are evidence only of those things which according to the course of business it was the duty of the person to enter, and are no evidence of independent collateral matters. There is no such restriction under the Indian Act.

Pedigree
cases.

8. In England the declaration of an illegitimate member of a family would not be admissible in pedigree cases. In India the English rule has been rescinded since 1855. On this point the Evidence Act (Sec. 42, cl. 5) merely requires that the declarant has special means of knowledge of the relationship, and that the statement was made before the question in dispute was raised. In India, therefore, statements made by servants, friends and neighbours as to relationship, and statements made by a deceased person asserting his own illegitimacy, would be admissible.

Statements by
deceased
persons.

9. Under the Evidence Act, Sec. 32, cl. (7), statements made by a deceased person and contained in documents relating to any transaction by which any right was created, etc., are admissible upon questions of mere private rights. In England such evidence does not appear to be admissible.

Entries in
public books.

10. In England, to render entries in public books, or registers admissible, they must have been made promptly, or at least without such long delay as to impair their

credibility, and in the mode required by law, if any has been prescribed. The Evidence Act (Sec. 35) contains no such rule.

11. Section 36 of the Evidence Act as to maps or Maps, charts, and Sec. 35 as to proof of foreign laws, go somewhat beyond the English rules on these subjects. The Indian Act admits statements made in 'published maps or charts generally offered for public sale' and 'in maps and plans made under the authority of Government.' It also permits books containing foreign laws to be directly referred to. A munsif's opinion on the state of the Scotch marriage-law or the meaning of an article of the Code Napoleon, is perhaps not very likely to be correct. The Indian Act, however, dispenses with the necessity of calling professional or official experts to speak on the subject.

12. In India, judgments *in rem* are conclusive in Foreign laws, criminal as well as in civil proceedings (Sec. 41) In England this seems doubtful.

13. In England, a party to a suit would not be allowed to defeat a judgment by showing that in obtaining it he had practised an imposition upon the Court. Under the Evidence Act, however, there is no such restriction, Sec. 41, as now worded, permitting any party to a suit or other proceeding to show that a judgment was obtained by his own fraud or collusion. Judgments
in rem.

14. The opinion of experts only is admissible under the Evidence Act (Sec. 45) as to questions of sanity. It is Opinions as to
sanity. otherwise in England, at least in the Probate Court, where witnesses to a will may give their opinions as to the sanity of the testator.

15. Under the Evidence Act (Sec 54) the fact that the accused person has been previously convicted of *any offence* is relevant and may be proved in the first instance by the prosecution. In England, such evidence can be given only Previous
convictions.

in reply to evidence of good character offered for the defence.

Judicial
notice.

16. The provisions in the Evidence Act, Sec. 57, clause (7) as to judicial notice of the names etc. of gazetted officers, and the provisions in the same section that the 'court may resort for its aid to appropriate books or documents of reference,' are in advance of the English law on these subjects. The Act (Sec. 60) permits the opinions of experts, expressed in any treatise commonly offered for sale, and the grounds of such opinion, to be proved by the production of the treatise if the author is dead etc. This is also in advance of English law.

Certified
copies of
registers.

17. The Evidence Act (Sec. 65) makes certified copies of registers of births, deaths, marriages, etc. admissible in criminal as well as in civil proceedings. In England in criminal proceedings, the original registers must be produced.

Attested
instruments.

18. In England, when the validity of an instrument depends on its formal attestation, the attesting witness must always be produced. In India, the admission of a party to such an instrument of its execution by himself has, since 1855, been sufficient proof of its execution against him.

Comparison of
seals.

19. Under the Evidence Act, Secs. 47 and 73, comparison of a disputed writing or seal with a genuine writing or seal may be made by witnesses or by the Court in criminal as well as in civil proceedings. There is no such provision in England as to seals. As to writings, see 17 & 48 Vic. c. 125, secs. 17, 103; and 28 & 22 Vic. c. 18, secs. 1 & 8.

Oral admission
of
contents of
documents.

20. Oral admissions of the contents of a document are not admissible as primary evidence under the Evidence Act (Secs. 22, 91). In England, on the contrary, the parol admission of a party, and his acts amounting to admissions are received as primary proof against himself and those

claiming under him, although they relate to the contents of an instrument, which are directly in issue in the cause.

21. In England, the presumption of legitimacy may be rebutted by proof of the impotency of the husband. Under the Evidence Act (Sec. 112) such proof cannot be given. Presumption of legitimacy.

22. Under Sec 118 of the Evidence Act a child is competent to testify if it can understand the questions put to it, and give rational answers thereto. In England, a child to be a competent witness, must believe in punishment in a future state for lying. Competence of children.

23. Husbands and wives are competent witnesses for or against each other in criminal, as well as in civil proceedings. (Section 120, Evidence Act). This is not so in England in criminal proceedings except, of course, when an injury to person or property has been committed by the one against the other. Competence of husbands and wives.

24. In England, an arbitrator, except under very special circumstances, is privileged as to what passed in his mind when exercising his discretionary power. He has no such privilege under the Evidence Act, Sec. 121. Privilege of arbitrator.

25. The privilege as to non-production of title deeds, conferred by the Act (Sec. 130) on witnesses who are not parties to the suit, is more extensive than in England. Non-production of title deeds.

26. In England, a witness is excused from replying to any question the answer to which would have a tendency to expose him or her or his or her wife or husband, to any kind of criminal charges or to any penalty or forfeiture. In India, when the question is as to any relevant matter, the rule is the reverse; see Evidence Act, Sec. 132, which, however, provides that no such answer shall subject the witness to any arrest or prosecution, or be proved against him in any criminal proceeding, except a prosecution for giving false evidence by such answer. Privilege of witness.

27. In England two witness are required in case of certain treasons, and corroborative evidence is required in Corroboration in cases of perjury etc.

the following cases :—cases of perjury where there is only a single opposing witness ; bastardy cases where the mother is the only witness ; and suits for breach of promise of marriage. In India conviction for the offences analogous to treason may be obtained on the testimony of a single witness, and corroborative evidence is not required in any of the three cases last mentioned.

Impeaching
credit of
witness.

28. In England, the credit of a witness may, amongst other ways, be impeached by evidence of facts contradictory of the evidence given by him. The express provision of the Indian Act, Sec 155, is less extensive. The witness's credit, it is provided, can only be impeached in certain specified ways, that is, by questions or by testimony going directly to his credit, not mediately through a contradiction of the particular matter deposed to by him in the case.

Prior state-
ment of
witness.

29. In England evidence of the prior statement of a witness is not generally admissible to corroborate his testimony. But under the Indian Act, Sec. 157, such evidence is admissible if the statement was contemporaneous with the fact stated, or made before some competent authority.

Examination
by Judge.

30. In England the Judge may recall a witness at any stage of a trial and put such *legal* question to him as the exigencies of justice require. And in a criminal case after examination of witnesses on the prisoner's behalf, if the Judge calls and examines a witness for the prosecution, the prisoner's counsel has a right to cross-examine again. Under the Indian Act, Sec. 162, the questions put by the Judge need not be legal and the witness can not be cross-examined without the leave of the Court.

Relaxing rules
as to admis-
sibility.

31. In England, in civil cases, the rule as to admissibility may at the trial be relaxed by consent of the parties*. The Indian Act gives no such power†.

* There are exceptions as to secrets of State, certain attested instruments, etc.

† Whitely Stokes' Anglo-Indian Codes, Vol. II, pp. 827-833.

Characteristic features of the English system of Judicial Evidence.—The characteristic features of the English system of judicial system may be stated as consisting of three general principles :—

(1) The admissibility of evidence is matter of *law*, but the weight or value of evidence is matter of *fact*.

(2) Matters of law, including the admissibility of evidence are determined by the Judge, matters of fact by the Jury*.

"By confiding to the Judge the decision of all questions of law and practice it secures the law and the practice being altered by any mistake or even misconduct, of the Jury ; by treating as matter of law, and consequently within his province, the admissibility of evidence, and the sufficiency as a legal basis of adjudication of any that may be received, it prevents the Jury from acting without evidence or on illegal evidence ; and by entrusting him with the general oversight of the proceedings and the duty of commenting upon the evidence reaps the benefit of his knowledge and experience. But by taking out of his hands the actual decision on the facts and the application of the law to them, it cuts up mechanical decision by the roots, prevents artificial systems of proof from forming, and secures the other advantages of a casual tribunal. Besides the difference that exists between the Judge and Jury in station, acquirements, habits and manner of viewing things, not only enables them to exert on each other a mutual and very salutary control, but confers an enormous moral weight on their joint action." (Best, pp. 112-113).

(3) In determining the admissibility of evidence, production of the *best evidence*, should be exacted.

The true meaning of this fundamental principle will be best understood by considering the three chief applications

What are chief the characteristic features of the English common law system of Judicial evidence? C.U. 1915(b).

What are the respective functions of the Judge and the Jury ? What are Best's arguments for or against trials with the aid of the Jury ? C.U. 1916(b).

What the the respective functions of a Judge and a Jury under the English Law ? How far has this distinction between the two been adopted by the Indian Legislature ? C.U. 1923(a), 1924 (b).

Explain what is meant by the rule that the best evidence is to be adduced

* In India, this distinction is observed only in the *criminal trials*, for the *civil cases* here are not tried by a Jury, as in England.

to prove questions in dispute and illustrate your answer by reference to the chief applications of the principle.

C.U. 1915(b).

Illustrate the rule : "The best evidence must be given."

C.U. 1920(b).

Discuss the merits of the system of judicial evidence which insists upon the *viva voce* examination of witnesses in open court.

C.U. 1918(b).

of it. Evidence, in order to be receivable should come through proper instruments, and be in general original and proximate. With respect to the first of these, with the exception of a few matters which either the law notices judicially, or are deemed too notorious to require proof, the Judge and Jury must not decide facts on their personal knowledge, and should be in a state of legal ignorance of everything relating to the questions in dispute before them, until established by legal evidence, or legitimate inference from it. It is obvious that if they were allowed to decide on impressions, or on information acquired elsewhere, not only would it be impossible for a superior tribunal, the parties, or the public to know on what grounds the decision proceeded, but it might be founded on common rumour or other form of evidence, the very worst instead of the best. The next branch of this rule is that which exacts original and rejects derivative evidence—that no evidence shall be received which shows on its face that it only derives its force from some other which is withheld. The remaining application of this great principle is that, as a condition precedent to the admissibility of evidence, the law requires an *open and visible connexion* between the principal and evidentiary facts, whether they be ultimate or subalternate.

There are two other remarkable features of the English system of judicial evidence, namely, the *viva voce* examination of witnesses and the publicity of judicity evidence. "Of all checks on the mendacity and misrepresentations of witnesses, the most effective is the requiring their evidence to be given *viva voce*, in presence of the party against whom they are produced, who is allowed to cross-examine them *i.e.* ask them such questions as he thinks may serve his cause. The great tests of the truth of any narrative are the consistency of its several parts and the possibility of the matters narrated. Stories false in *to* to are comparatively rare—it is by misrepresentation, suppression of

some things, and addition of others, that a false colouring is given to things, and it is only by a searching inquiry into the surrounding circumstances that the whole truth can be brought to light. Now although much valuable evidence is often elicited by questions put from the tribunal, and although the story told by a witness frequently discloses of itself some inconsistency or improbability fatal to the whole, it is chiefly from the party against whom false testimony is directed that we can expect to obtain the most sufficient materials for its detection. He, above all others, is interested in exposing it, and is the person best acquainted, often the only person acquainted, with the facts as they really have occurred. Besides, as the answer to one question frequently suggests another, it is extremely difficult for a mendacious witness to come prepared with his story ready fitted to meet any question which may be thus put to him all on a sudden. (Best, pp. 130-131)

The other great check is *publicity* of the judicial proceedings—the English Courts of justice being open to all persons, and in criminal cases the by-standers are even invited by proclamation to come forward with any evidence they may possess affecting the accused. The advantages of this are immense. “In all cases” observes Bentham, “say rather in most, the publicity of the examination or deposition operates as a check upon mendacity and incorrectness..... Environed, as he sees himself by a thousand eyes, contradiction, should he hazard a false tale, will seem ready to rise up in opposition to him from a thousand tongues, many a known face and every unknown one, presents to him a possible source of detection, from whence the truth he is struggling to suppress, may, through some unexpected channel, burst forth to his confusion.”

Fundamental rules of English Law of Evidence—These are :—(1) Evidence must be confined to the matters in issue.

Mention the fundamental rules of the English Law

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of Evidence
and comment
on them.
Mad. 1920(b).

(2) Hearsay is not to be admitted.

(3) In all cases, the best evidence must be given.
(Stephen, 3).

[For comments on rules (1) and (2) see *infra*. For comments on rule (3) see *infra* and pp. 13-14 *ante*.]

What are the
leading differ-
ences between
judicial inves-
tigations and
scientific
inquiries?
Mad. 1919.

Difference between Judicial and Scientific inquiries.—The leading differences between judicial investigations and inquiries into physical nature are as follows.—

1. In physical enquiries the number of relevant facts is generally unlimited and is capable of indefinite increase by experiments. In judicial investigations the number of relevant facts is limited by circumstances and is incapable of being increased.

2. Physical enquiries can be prolonged for any time that may be required in order to obtain full proof of the conclusion reached and when a conclusion has been reached it is always liable to review if fresh facts are discovered, or if any objection is made to the process by which it was arrived at. In judicial investigations it is necessary to arrive at a definite result in a limited time; and when that result is arrived at, it is final and irreversible with exceptions too rare to require notice.

3. In physical inquiries the relevant facts are usually established by testimony open to no doubt, because they relate to simple facts which do not affect the passions, which are observed by trained observers who are exposed to detection if they make mistakes and who could not tell the effect of misrepresentation, if they are disposed to be fraudulent. In judicial enquiries the relevant facts are generally complex. They affect the passions in the highest degree. They are testified to by untrained observers who are generally not open to contradiction and are aware of the facts which they allege upon the conclusion to be established.

4. On the other hand, approximate generalizations are more useful in judicial than they are in scientific inquiries, because in the case of judicial enquiries every man's individual experience, supplies the qualifications and exceptions necessary to adjust general rules to particular facts, which is not the case in regard to scientific enquiries.

5. Judicial enquiries being limited in extent, the process of reaching as good a conclusion as is to be got out of the materials is far easier than the process of establishing a scientific conclusion with complete certainty, though the conclusion arrived at is satisfactory. (Stephen's Introduction, pp. 44-46 ; Woodroff's Evidence Act, 4th Ed. pp. 27-28).

The Indian Evidence Act Its scope and object.—The Indian Evidence Act (I of 1872), as its Preamble* shows, was passed with a view “to consolidate, define and amend the law of evidence” prevailing in British India. It is, thus, not merely a fragmentary enactment, but a consolidatory one, repealing all rules of evidence other than those contained in any Statute, Act or Regulation in force in any part of British India and not expressly repealed by this Act or enacted subsequent thereto. † It does not, however, claim to be a complete and exhaustive Code of the Law of Evidence for British India. (39 Cal. 164). There are also certain other Statutes, Acts and Regulations relating to the Law of Evidence in British India Mr. Field says : “There are several provisions of Statutes of the British Parliament and of Acts of the Indian Legislature which relate to the subject of evidence, and which are in force in India...It may be well to remember that the Evidence Act does not contain the whole of the Law of Evidence as enacted by the Legislature, but

* The Preamble runs as follows :—“Whereas it is expedient to consolidate, define and amend the Law of Evidence : it is hereby enacted as follows etc.”

† Vide S. 2 which repeals all *unwritten* rules of evidence which are not to be found in any Statute, Act or Regulation in force in British India.

at the same time there are no other rules of evidence now in India, except such as are contained in this Act or in some other Statute, Act or Regulation in force in British India and not expressly repealed by this Act." A person tendering evidence must, therefore, show that such evidence is admissible under some provisions either of this Act or of some other Statute, Act or Regulation in force in British India. This is the opposite of the rule adopted in continental countries, such as France, where every thing is admissible as evidence which the law does not expressly exclude.

Explain briefly the structure of the Indian Evidence Act, Bom. 1893.

Plan of the Act.—The following is a skeleton of the contents of the Act :—

Part I.—Relevancy of Facts.

Chapter I.—Preliminary matters and Definitions.

Chapter II.—Of the Relevancy of Facts

Part II.—On Proof.

Chapter III.—Facts which need not be proved.

Chapter IV.—Of Oral Evidence.

Chapter V.—Of Documentary Evidence

Chapter VI.—Of the Exclusion of Oral by Documentary Evidence.

Part III.—Production and Effect of Evidence.

Chapter VII.—Of the Burden of proof.

Chapter VIII.—Estoppel.

Chapter IX.—Of Witnesses

Chapter X.—Of the Examination of Witnesses.

Chapter XI.—Of Improper Admission and Rejection of Evidence.

The Indian Evidence Act consists of three parts. Part I mainly deals with the *Relevancy of facts* or with answer to the question, 'what facts may and what may not, be proved in order to establish the existence of the right, duty or liability defined by substantive law'. Part II deals with *Proof of facts* and decides, 'what sort of evidence is to be given of a fact which

may be proved.' Part III deals with the *Production and Effect of evidence* or decides 'by whom and in what manner the evidence must be produced by which any fact is to be proved.'

Part I consists of two chapters (I and II) containing 55 sections (1—55). Chapter I consists of Ss. 1-4 and deals with certain preliminary matters, such as, short title, the date and the extent of operation of the Act and the interpretation of certain terms used in the Act. Chapter II consists of Ss. 5-55 dealing with the subject of relevancy of facts

Part II provides for proof of facts and consists of four chapters (III—VI) containing 45 sections (Ss. 56-100) : Chapter III consisting of Ss. 56-58 deals with facts which need not be proved. Chapter IV containing sections 59-60 deals with oral evidence. Chapter V deals with documentary evidence and consists of Ss. 61-90. Chapter VI deals with the question of exclusion of oral by documentary evidence and the exceptions thereto (sections 90-100).

Part III consists of five chapters (VII—XI) and 67 sections (101—167) dealing with the production and effect of evidence. Chapter VII deals with the subject of the burden of proof and presumptions (Ss. 101-114). Chapter VIII deals with estoppels (Ss. 115-117). Chapter IX speaks of witnesses who are competent to testify (Ss. 118-134). Chapter X deals with the examination of witnesses (Ss. 135-166); and Chapter XI deals with the effect of improper admission and rejection of evidence (S. 167).

The general arrangement and the substance of the Indian Evidence Act is sufficiently explained in the following extracts from Sir J. F. Stephen's Introduction to the Evidence Act :—

"All rights and liabilities are dependent upon and arise out of facts. Every judicial proceeding whatever has for its purpose the ascertaining of right or liability. If the proceeding is criminal, its object is to ascertain the liability to punish

'The object of judicial proceedings is the determination of rights and liabilities which depend upon facts.' Explain concisely the

application of
the above
principle to a
judicial
enquiry.
C. U. 1903.

ment of the person accused. If the proceeding is civil, the object is to ascertain some right of property or of status, or the right of one party, and the liability of the other, to some form of relief. In order to effect this result, provision must be made by law for the following objects :—*First*, the legal effect of particular classes of facts in establishing rights and liabilities must be determined (This is the province of what has been called substantive law). *Secondly*, a course of procedure must be laid down by which persons interested may apply the substantive law to particular cases. (This is the province of what is called adjective law or law of procedure).

The law of procedure includes, amongst others, two main branches,—(1) *the law of pleading*, which determines what in particular cases are the questions in dispute between the parties, and (2) *the law of evidence*, which determines how the parties are to convince the court of the existence of that state of fact which according to the provisions of substantive law, would establish the existence of the right or liability which they allege to exist.

The following is a simple illustration : A sues B on a bond for Rs. 1,000. B says that the execution of the bond was procured by coercion. The substantive law is, that a bond executed under coercion cannot be enforced. The law of procedure lays down the method according to which A is to establish his right to the payment of the sum secured by the bond. One of its provisions determines the manner in which the question between the parties is to be stated. The law of evidence determines—

- (1) What sort of facts may be proved in order to establish the existence of that which is defined by the substantive law as coercion ?
- (2) What sort of proof is to be given of those facts ?
- (3) Who is to give it and how is it to be given ?

Thus, before the law of evidence can be understood or

applied to any particular case it is necessary to know so much of the substantive law as determines what, under given states of fact, would be the rights of the parties, and so much of the law of procedure as is sufficient to determine what questions it is open to them to raise in the particular proceeding.

Thus in general terms the law of evidence consists of provisions upon the following subjects :—

- (1) *The relevancy of facts* or what sort of facts may be proved in order to establish the existence of the right, duty or liability defined by substantive law. (This forms the subject-matter of Part I of the Evidence Act).
- (2) *The proof of facts* or what sort of proof is to be given of the facts. (This is dealt with in Part II of the Evidence Act).
- (3) *The production of proof of relevant facts i.e.,* who is to give it and how is it to be given. (This is dealt with in Part III of the Evidence Act)

The above three general heads may be distributed more particularly as follows :—

1. **Relevancy of Facts**—Facts may be related to rights and liabilities in one of two ways ;—

- (1) They may by themselves or in connexion with other facts, constitute such a state of things that the existence of the disputed right or liability would be a legal inference from them. From the fact that A is the eldest son of B, there arises of necessity the inference that A is by the law of England the heir-at-law of B, and that he has such rights as that status involves. From the fact that A caused the death of B, under certain circumstances, and with a certain intention or knowledge, there arises of necessity the inference that A murdered B and is liable to the punishment provided by law for murder.

Facts thus related to a proceeding may be called facts in issue, unless their existence is undisputed.

- (:) Facts which are not themselves in issue in the sense above explained, may affect the probability of the existence of facts in issue, and be used as the foundation of inferences respecting them; such facts are described in the Evidence Act as relevant facts.

All the facts with which it can in any event be necessary for Courts of justice to concern themselves, are included in these two classes. The first great question, therefore, which the law of evidence should decide is, what facts are relevant. (The answer to this question is to be learnt from Chapter II of the Evidence Act) What facts are in issue in a particular case is a question to be determined by the substantive law, or in some instance by that branch of the law of procedure which regulates the forms of pleading, civil or criminal.

II. Proof of Relevant Facts.—Whether an alleged fact is a fact in issue or relevant fact the Court can draw no inference from its existence till it believes it to exist; and it is obvious that the belief of the Court in the existence of a given fact ought to proceed upon grounds altogether independent of the relation of the fact to the object and nature of the proceeding in which its existence is to be determined. The question is whether A wrote a letter. The letter may have contained the terms of a contract. It may have been a libel. It may have constituted the motive for the commission of a crime by B. It may supply proof of an *alibi* in favor of A. It may be an admission or a confession of a crime; but whatever may be the relation of the fact to the proceeding, the Court cannot act upon it unless it believes that A did write the letter, and that belief must obviously be produced, in each of the cases mentioned, by the same or similar means. If the Court requires the production of the original when the writing of

the letter is a crime, there can be no reason why it should be satisfied with a copy when the writing of the letter is a motive for a crime. In short, the way in which a fact should be proved depends on the nature of the fact, and not on the relation of the fact to the proceeding.

Some facts are too notorious to require any proof at all, and of these the Court will take judicial notice ; but if a fact does require proof, the instrument by which the Court must be convinced of it is evidence, by which is meant the actual words uttered or documents, or other things actually produced in Court, and not the facts which the Court considers to be proved by these words and documents. Evidence in this sense of the word must be either (1) oral or (2) documentary. A third class might be formed of things produced in Court, not being documents, such as the instruments, with which a crime was committed, or the property to which damage had been done, but this division would introduce needless intricacy into the matter. The reason for distinguishing between oral and documentary evidence is that in many cases the existence of the latter excludes the employment of the former, but the condition of material things other than documents, is usually proved by oral evidence, so that there is no occasion to distinguish between oral and material evidence.

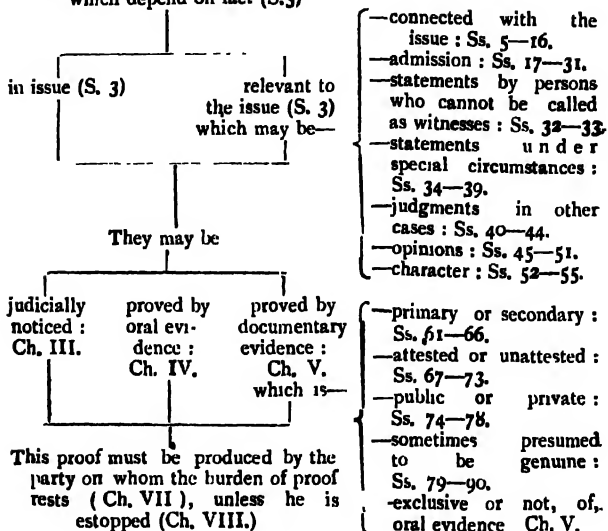
III. Production of Proof.—This includes the subject of the burden of proof ; the rules upon which answer the question.—By whom is proof to be given ? The subject of witnesses ; the rules upon which answer the question.—Who is to give evidence, and under what condition ? The subject of the examination of witnesses ; the rules upon which answer the question.—How are witnesses to be examined, and how is their evidence to be tested ? Lastly, the effect upon the subsequent proceedings, of mistakes in the reception and rejection of evidence, may be included under this head."

Tabular Scheme of the Act.—The following tabular scheme of the Act taken from *Stephen's Introduction*

'INDIAN LAW OF EVIDENCE.

to the Indian Evidence Act clearly explains the general plan and arrangement of the Act.

The object of legal proceedings is the determination of rights and liabilities, which depend on fact (S.3)



If given by witness (Ch. IX) they must testify subject to rules as to examination (Ch. X). Consequence of mistakes defined (Ch. XI).

N.B.—The figures refer to the Chapters and Sections of the Act which treat of the matter referred to.

The Indian Evidence Act.

PART I.

This part comprises chapters I and II, the former dealing with certain preliminary matters, such as, short title, the date and extent of operation of the Act and the definition of certain terms used in the body of the Act and the latter, with the subject of the relevancy of facts.

CHAPTER I.—Preliminary (Secs. 1—4).

Date and Extent of Operation of the Act.—The Indian Evidence Act (I of 1872) came into operation on the first day of September, 1872. It extends to the whole of British India and applies to all judicial proceedings in or before any Court including (*native*) Court martial. But it does not apply (1) to affidavits presented to any Court or officer; and (2) to proceeding before an arbitrator (S 1).

British India—means all territories and places within His Majesty's dominions which are for the time being governed by His Majesty, through the Governor-General of India or through any Governor or other officer subordinate to the Governor-General of India. (S. 3, cl 7, General Clauses Act, X of 1897).

Judicial Proceedings—The expression means proceedings before a Court of judicial tribunal in which judicial functions are being exercised. An enquiry in the course of which evidence is, or may be, legally taken on oath is included in this expression. An enquiry is judicial if the object of it is to determine a jural relation between one person and another, or a group of persons; or between him and the community generally; but even a judge acting without such an object in view is not acting judicially. (12 Bom. 36)

Court—This word includes all persons, except arbitrators legally authorised to take evidence. (*Vide* s. 3)

To what extent are the provisions of the Indian Evidence Act applicable to—(a) affidavits presented to any court; (b) proceedings before an arbitrator? C.U. 1911 (b). Are the provisions of the Evidence Act applicable to proceedings before an arbitrator? C. U. 20 (a).

Court-martial—The expression means and includes *native* Court-martial only. In the case of *European* Court-martial, the provisions of the Indian Evidence Act do not apply. (38 Vic. c. 7, s. 101 ; 44 & 45 Vic., c 58, s. 127).

Affidavits—*Vide* O. 19, Rr, 1-3, Civil Procedure Code and S. 539, Criminal Procedure Code.

Arbitrators -The arbitrators are not bound by the strict rules of evidence. But they are bound to conform to the rules of equity and natural justice. As to proceedings before arbitrators, *vide* s. 89 and schedule II of the Civil Procedure Code.

Enactments repealed by the Act.—(1 The Indian Evidence Act has repealed—

- (a) all rules of evidence not contained in any Statute, Act or Regulation in force in any part of British India ;

Note—Thus (a) the whole of the English common law rules of evidence that were hitherto in force in British India, but not contained in any Statute, Act or Regulation, and (b) all rules of Hindu and Mahomedan Law relating to evidence have been repealed.

- (b) all such rules, laws and regulations as have acquired the force of law under S. 25 of the Indian Councils Act, 1861, in so far as they relate to any matter herein provided for ;

Note—S. 25 of the Indian Councils Act, 1861, enacts that no rule, law or regulation, which, prior to the passing of the said Act, were made by the Governor-General or by any other authority, shall be deemed invalid etc. Those rules, laws and regulations which have thus been validated and have acquired the force of law by S. 25 of the Indian Councils Act, 1861, are repealed by the Evidence Act in so far as they relate to any rule of evidence contained in this Act.

- (c) the following enactments :—(i) 26 Geo. III. c. 57, s. 38 (so far as it relates to Court of Justice in the East Indies) (ii) 14 and 15 Vic. c. 99, s. 11 and so much of s. 19 as relates to British India; (iii) Act XV of 1852; (iv) Act XIX of 1853, sec. 19; (v) Act II of 1855; vi) Act XXV of 1861, s. 237.

(2) But nothing herein contained shall be deemed to affect any provision of any Statute, Act or Regulation in force in any part of British India and not hereby expressly repealed. (S. 2).

Note—This Proviso is important. It saves all rules of evidence which are to be found in any Statute, Act or Regulation in force in British India and which are not expressly repealed by the Act. Some of these rules are to be found in ss. 49 and 50 of the Indian Registration Act, ss. 19 and 20 of the Indian Limitation Act, ss. 54, 107 and 123 of the Transfer of Property Act, ss. 509-512 of the Criminal Procedure Code, s. 50 of the Hindu Wills Act, Rr. 10 & 12, O. 26 of the Civil Procedure Code, ss. 589 and 590 of the Bengal Municipal Act (III of 1897, B. C.) and the like. For a complete list of the Statutes, Act and Regulations which relate to the subject of evidence and which have been saved by this Act, see Whitley Stoke's Anglo-Indian Codes, Vol. II.

Definitions.—In this Act the following words and expressions are used in the following senses, unless a contrary intention appears from the context :—

(1) **Court.**—"Court" includes all Judges and Magistrates, and all persons, except arbitrators, legally authorised to take evidence. C.U.1914 (a).

Note.—This definition of "Court" is not exhaustive and is framed only for the purposes of this Act. In a trial by jury, the word "Court" includes both the judge and the Jury

(4 Cal. 483). A Commissioner appointed to take evidence under Rr. 1—10, O.26, C. P. C. or under Ss. 503-508, Cr. P.C. is a Court. (15 Mad. 147). As to whether a registering officer is a Court, there is a conflict of rulings.

(2) **Fact**—"Fact" means and includes -

C.U. 1918(a),
1905, 1920(a)
1926 (a) ;
All. 15.

(i) anything, state of things, or relation of things, capable of being perceived by the senses ;

(ii) any mental condition of which any person is conscious.

Illustrations.—(a) That there are certain objects arranged in a certain order in a certain place is a fact. (b) That a man heard or saw something, is a fact. (c) That a man said certain words, is a fact. (d) That a man holds certain opinion, has a certain intention, acts in good faith or fraudulently, or uses a particular word in a particular sense, or is or was at a specified time conscious of a particular sensation, is a fact. (e) That a man has a certain reputation, is a fact.

Note.—Clause (i) refers to what may be called *physical* or *external* facts. Illustrations (a), (b) and (c) exemplify this clause. Clause (ii) refers to *psychological* or *internal* facts. Illus. (d) and (e) illustrate this clause. The English Jurists have divided facts into :—(1) *Physical* and *Psychological*, (2) *Events* and *States of things*, (3) *Positive* or *Affirmative* and *Negative*. Of these divisions the Indian Evidence Act is concerned with only physical and psychological facts. A physical fact is that which manifests itself to the external senses. A psychological fact is that which exists in the mind. The *shot* of a musket, which kills a man, is a *physical* fact, the *intention* of him who fires it is a *psychological* fact. The Indian Evidence Act includes under physical facts, "any thing, state of things or relation of things capable of being perceived by the senses" ; and under psychological facts, "any mental condition of which any person is consci-

ous." Organs of senses are (1) *eyes*, which see, (2) *ears* which hear, (3) *nose* which smells, (4) *tongue* which tastes, and (5) *touch* which feels. So physical facts are things, states of things or relations of things, which can be seen, heard, smelt, tasted or felt by touch. Psychological fact is any mental condition or state of mind of which any person is conscious or any person can know and remember. This latter class of facts are incapable of direct proof by the testimony of witnesses; their existence can only be ascertained either by the confession of the party whose mind is their seat or by presumptive inference from physical facts.

(2) **Relevant**—One fact is said to be relevant to another when the one is connected with the other in any of the ways referred to in the provision of this Act relating to the relevancy of fact.*

Note.—The word "relevant" means that any two facts to which it is applied are so related to each other that, according to the common course of events, one either taken by itself or in connexion with other facts, proves or renders probable the past, present or future existence or non-existence of the other. (Stephen's Digest). Facts which are not themselves in issue, may affect the probability of the existence of facts in issue and be used as the foundation of inferences respecting them; such facts are described in the Act as relevant facts. Sections 6—55 *infra* treat of the relevancy of facts.

A fact is relevant to another fact when the existence of the one can be shown to be the cause or one of the causes, or effect or one of effects of the other, or where the existence of the one, either alone or together with other facts, renders the existence of the other highly probable,

C.U. 1914 (a)
1910 (b), 21
(b), 19 (a),
23 (b), 28 (a),
24 (a), 27 (b);
All, 1916;
Punj. 1915;
Mad. 1916.
Relevancy
means connec-
tion of events
as cause and
effect.

What is
meant by the
expression
"relevancy"
as referring
to the
admissibility
of evidence
in judicial
enquiries?

C. U. 1904.
Explain what
is meant by
"hearsay
evidence".
What in the
Evidence Act,
are the excep-

* *Vide* Chapter II, Sections 6-55 *post*. The various ways in which a fact may be so related to one another as to be relevant are described in ss. 6-55 of this Act.

tions to the general rule. "Hearsay evidence is not admissible"? C.U. 1911(a).

Give some exceptions in the Evidence Act to the rule excluding hearsay. C.U. 1915(b), 1927 (b).

according to the common course of events. Four classes of facts which in common life would usually be regarded as falling within this definition of relevancy, are excluded from it by the law of evidence except in certain cases :—

1. Facts, similar to, but not specially connected with, each other. (*Res inter alios acta*).
2. The fact that a person not called as a witness has asserted the existence of any fact. (*Hearsay*).
3. The fact that any person is of opinion that a fact exists. (*Opinion*).
4. The fact that any person's character is such as to render conduct imputed to him probable or improbable. (*Character*).

To each of these four exclusive rules there are, however, important exceptions which are defined by the law of evidence. (Exceptions to the *first* rule are embodied in ss. 11, 14, 15 and 40-44; exception to the *second* rule in ss. 17-39; exceptions to the *third* rule in ss. 45-51 and exceptions to the *fourth* rule in ss. 52-55 of the Evidence Act).

(4) **Facts in issue**—i) The expression "fact in issue" means and includes any fact from which, either by itself, or in connection with other facts, the existence, non-existence, nature or extent of any right, liability or disability asserted or denied in any suit or proceeding necessarily follows. C.U. 1918(a), 1914 (a), 1921 (Suppl.), 1921 (b), 1919 (a), 27 (b), 26 (b); Bom. 1917(b).

(ii) Whenever, under the Civil Procedure Code any Court records an issue of fact,* the fact to be asserted or denied in answer to such issue is also a fact in issue.

Illustrations.—A is accused of the murder of B. At his trial the following facts may be in issue : (1) That A caused B's death ; (2) that A intended to cause B's death, (3) that A had received grave and sudden provocation from B ; (4) that A, at the time of doing the act which caused B's

* See Order 14, C P Code

death was, by reason of unsoundness of mind, incapable of knowing its nature. (These facts, if proved, would necessarily lead to the inference that A is or is not liable for the murder of B and if liable, to what extent).

Note.—The “facts in issue” are facts out of which some legal right, liability or disability involved in the enquiry, necessarily arises, and upon which accordingly, a decision must be arrived at. Matters which are affirmed by one party to a suit and denied by the other may be denominated “facts in issue.” What facts are in issue in a particular case, is a question to be determined by the substantive law or in some cases by that branch of the law of procedure which regulates the law of pleadings, civil or criminal. [In civil cases facts in issue are determined by the process of framing issues—*Vide* O XIV. Rr. 1—7. C. P. C. In criminal cases the charge constitutes and includes the facts in issue.—*Vide* Ch. XIX C. P. C.]

Facts in issue, may be defined as a material fact which is in dispute between the parties and it becomes an *issue* when it is stated by one party and denied or not admitted by the other and it therefore becomes necessary to prove the same in order to establish the claim or defence. (Kinney).

Issue.—The word “issue” has a technical meaning under the Civil Procedure Code. Issues arise when a material proposition of law or facts is affirmed by the one party and denied by the other. Material propositions are those propositions of law or fact which a plaintiff must allege in order to show a right to sue. Each material proposition affirmed by one party and denied by the other must form the subject-matter of a distinct issue. Issues are of two kinds. (1) *Issues of fact*; (2) *Issues of law*. (Order 14, C. P. C.) In the Evidence Act the expression “fact in issue” means those facts which are to be proved for the purpose of evidencing such issues of fact under the Civil Procedure Code. Under the Penal Code, each offence or charge is an

Facts in issue mean the matters which are in dispute or which form the subject of decision in the suit.

What do you understand by a “fact in issue” and how is it distinguished from or related to an “issue of fact”?

C.U. 1911 (b). Explain with illustration “Facts in issue”.

C.U. 1924 (a), 1924 (b).

issue to be tried. In all substantive laws, any right or liability to be determined is an issue. By the adjective laws or laws of procedure, forms of pleading, civil or criminal, determine the issues to be tried. In the early ages of common law, the pleadings were altercations in open Court, in presence of the Judges, whose province it was to superintend or moderate the oral contention thus conducted before him. In doing this their general aim was to compel the pleaders so to manage their alternate allegations as at length to arrive at some *specific point or matter* affirmed on one side and denied on the other. If this point was matter of fact, the parties were said to be *at issue* (*ad exitum*—that is, at the end of their pleading); and the question thus raised for decision was called the issue. (Greenleaf on Evidence).

C.U. 1918(a),
1915 (a),
1920(a), 26(a). (5) **Document.**—"Document" means any matter expressed or described upon any substance by means of letters, figures or marks or by more than one of those means intended to be used, or which may be used for the purpose of recording that matter.*

Illustrations.—A writing is a document. Words printed, lithographed or photographed are documents. A map or plan is a document. An inscription on a metal plate or stone is a document. A caricature is a document.

Note—Under the term "documents" are properly included all material substance on which the thoughts of men are represented by writing or any other species of conventional mark or symbol. Thus the wooden scores on which bakers, etc. indicate, by notches, the number of loaves of bread or quarts of milk supplied to their customers are documents as much as the elaborate deeds. (Best on Evidence, 209).

C.U. 1918(a),
1915 (a),
1921 (Suppl.),
1920 (a),
1920 (b),
26 (a);
All. 1915. (6) **Evidence.**—"Evidence" means and includes—

* Cf. Sec. 29 of the Indian Penal Code and Sec. 3 (16) of the General Clauses Act (X of 1897)

(i) all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under enquiry : these are called *oral* evidence) ;

Define or explain :—
Judicial
evidence.
Mad. 1916.

(ii) all documents produced for the inspection of the Court : (these are called *documentary* evidence).

Note.—The definition of “evidence” given here is not exhaustive. It does not cover everything that the court has before it. There are certain other *media* of proof e. g., the statements of parties and accused persons, the demeanour of witnesses, the result of local investigations, fact of which the court takes judicial notice and any real or personal property, the inspection of which may be material in determining the questions at issue, such as weapons, tools or stolen property. All these materials in addition to the oral statements of witnesses and documents, may be considered by the judge in coming to a right decision, but are not included in this definition.

The word evidence in law includes all the legal means, exclusive of mere arguments, which tend to prove or disprove any matter of fact, the truth of which is submitted to judicial investigation. (Taylor) Phipson defines it to mean the facts, things and documents which may be legally received in order to prove or disprove the fact under enquiry. Mr. Best says :—“The word evidence signifies in its original sense the state of being evident *i.e.*, plain, apparent or notorious. But by an almost peculiar inflexion of our language it is applied to that which tends to render evident or to generate proof. This is the sense in which it is commonly used in our law books. Evidence thus understood has been defined as any matter of fact, the effect, tendency or design of which is to produce in the mind a persuasion, affirmative or disaffirmative, of the existence of some other matter of fact. The fact sought to be proved is termed the *principal fact* ; the fact which tends to establish it, the *evidentiary fact*.”

Division of Evidence.—Evidence may be—(a) *Direct* or *Circumstantial*.(b) *Primary* or *Secondary*.(c) *Oral* or *Documentary* or *Real*.(d) *Original* or *Hearsay*.

Illustrate the distinction between direct and circumstantial evidence.

C.U. 1917(b), 1921 (Suppl.), 1919 (a).

What do you understand by "direct" and "indirect" or "circumstantial" evidence?

Differentiate between the two with illustrations.

C.U. '12 (a).

Distinguish circumstantial for direct evidence.

C.U. '25 (b)

Explain what is meant by circumstantial evidence.

Distinguish circumstantial evidence from direct evidence.

Illustrate your answer by two examples.

C. U. 19 (b).

Explain :—circumstantial evidence.

All. 1916,

Bom. 1917(b).

Direct and Circumstantial.—Mr. Starkie says —

Evidence of a fact may be obtained in two ways, namely—

(1) By information derived either immediately or mediately from those who had actual knowledge of the fact; or (2) By

means of *inferences* or *conclusions* drawn from other facts connected with the principal fact which can be sufficiently established. Direct evidence is the testimony

of a witness to the existence or non-existence of the fact or facts in issue *e. g.*, A kills B; C sees the act done. Here the evidence of C is *direct*. Circumstantial

evidence is the testimony of a witness to other facts from which the fact in issue may be inferred *e. g.*, A kills B—no one sees the act done, but C hears a cry and a shot and sees A running away and finds a gun near B, belonging to A;

here the evidence of C is *circumstantial*. As regards admissibility both direct and circumstantial evidence stand on the same footing. But direct evidence is generally of superior cogency; the advantage of the former is that there is only one source of error, *viz.*, fallibility of the testimony while

the other has in addition fallibility of inference. The weight of direct evidence varies according to the credit given to a witness; the weight of circumstantial evidence varies also

according to the number of independent facts they support; but sometimes, when circumstances connect themselves closely

with each other, when they form a large and a strong body so as to carry conviction to the mind of the jury, it may be

proof of a more satisfactory sort than that which is direct. When the proof arises from the irresistible force of one or

other circumstances which we cannot conceive to be fraudulently brought together upon one point, that is less fallible than

under some circumstances direct evidence may be: it is

therefore said that "*witnesses may lie ; but circumstances do not*".*

Primary and Secondary.—Primary evidence is that which from its own production shows to admit of no higher or superior source of evidence. Secondary is that which from its production implies the existence of evidence superior to itself. Primary evidence is that which the law requires to be given first. Secondary is that which may be given in the absence of that better evidence when an explanation of its absence has been given (2 Q. B. 113) Mr Phipson says : "Primary evidence means the best or highest kind, that which the law regards as affording the greatest certainty of the fact in question ; thus production of the original document or proof of an admission of its contents by the party against whom it is tendered is considered primary in this

Distinguish between direct and circumstantial evidence. Estimate their respective value in the matter of proof. C. U. '23(b), '12(b). What is primary evidence ? What is secondary evidence ? When is the latter admissible ? C. U. 1913(b), '16 (a), 1901, 1905,

* But Mr Taylor says "Witnesses may lie, but circumstances cannot," has been more than once repeated from the Bench and is now almost received as a judicial maxim, yet certainly, no proposition can be more false or dangerous than this. If circumstances mean---and they can have no other meaning---those facts which lead to the inference of the fact in issue, they not only can, but constantly do, lie ; or in other words, the conclusion deduced from them is often false." In circumstantial evidence, if a single link in the chain of proof be wanting or be proved false or fallacious, then the entire fabric is demolished ! Circumstantial evidence can produce probable inference, such as our common sense draws from circumstances usually occurring in such cases. There are almost infinite shades from the lightest probability to the highest moral certainty. Circumstantial evidence is not conclusive proof of any fact in issue, but only a conclusion derived from circumstances by the united aid of experience and reason. To convict on circumstantial evidence alone, not only must the court be satisfied that each of the facts on which the presumption of guilt is founded is proved beyond reasonable doubt, but there must be a chain of circumstances so far complete as to leave no doubt for connecting the accused with the commission of the crime ; the circumstantial evidence must be exhaustive and exclude the possibility of guilt of any other person or must point conclusively to the complicity of the accused (18 C. W. N. 1144) Before finding an accused person guilty of an offence the court must be satisfied that the incriminating facts are incompatible with his innocence and are incapable of explanation upon any other hypothesis than that of his guilt.. (4 Punj. W. R. 118).

1910 (a), '14 (a). Explain and illustrate :—"Primary and secondary evidence". C. U. 19 (a). Define :—secondary evidence. All. '15.

Conviction on circumstantial evidence.

sense. Secondary evidence means inferior or substitutionary evidence, that which itself indicates the existence of more original sources of information ; thus a copy or the recollection of a witness who has read the document, is secondary."

Oral, Documentary and Real—(i) *Oral*—This is evidence given by word of mouth in open court or in such other way as the court may direct. It includes all statements which the court permits or requires to be made before it by witnesses in relation to the matter of fact under enquiry. The value thereof depends upon the demeanour of a witness, and the credibility that can be attached to his evidence after cross-examination. (ii) *Documentary*—This is evidence given by the production of deeds, documents, letters or anything in writing. It may, as already explained, be primary or secondary (iii) *Real*—This kind of evidence is the production of a particular thing in court, including evidence furnished by things, as distinguished from persons, as well as evidence furnished by persons considered as things. It is of great value in certain cases, but this value depends to a great extent upon oral evidence to connect the thing produced with the fact in issue (Kinney).

Define or explain :—
Real evidence.
Mad. '16.

Explain and illustrate :—
"Hearsay"
C.U. 19 (a).
What is "hearsay evidence" ?
On what principle is it generally excluded ?
C. U. 20 (b).
"Hearsay is no evidence".
Illustrate exception to this rule
C.U. '27 (b).

Original and hearsay.*—Original evidence means any oral or documentary statement whose materiality depends on the fact that it was made and not on the fact that it was true; the term hearsay (or derivative or secondhand) evidence referring to statements which are offered as evidence of their own truth. (Phipson). Hearsay, in its legal sense, is confined to that kind of evidence (whether spoken or written) which does not derive its credibility solely from the credit due to the witness himself, but rests also in part on the veracity and

* The word "hearsay" is used in various senses. Sometimes it means whatever a person is heard to say: sometimes it means whatever a person declares on information given by some one else not upon the evidence of his own senses: sometimes it is treated as being nearly synonymous with "irrelevant." (Stephen's Introduction).

competency of some other person from whom the witness may have received his information. (Phillip's Ev. 143). Another definition is : "the evidence not of what the witness knows himself but of what he has heard from other" or "a statement made by a witness of what has been said and declared out of court by a person not a party to the suit" "Secondary evidence of oral statements is generally referred to as hearsay evidence and the word, according to its literal meaning, should perhaps be confined to oral evidence, but it is, as a matter of fact, now used to cover evidence both oral and written and also statements in which a person who is not called, states what he saw and heard. As a general rule this is not admissible, but there are exceptions as hereafter shown." (Kinney).

Best's Classification of Evidence.—Mr. Best mentions the following divisions of evidence :—

I. In the first place, evidence is either *direct* or *indirect*, according as the principal fact follows from the evidentiary, the *factum probandum* from the *factum probans*, immediately or by inference. Direct evidence is commonly used as limited to cases where the principal fact or *factum probandum* is attested directly by witnesses, things or documents. Indirect evidence, known also by the name of circumstantial evidence, is either conclusive or presumptive ; *conclusive* where the connection between the principal and evidentiary facts, the *factum probandum* and *factum probans*, is a necessary consequence of the laws of nature ; *presumptive*, where it only rests on a greater or less degree of probability.

II. Again, evidence is either *real* or *personal*. By *real* evidence is meant evidence of which any object belonging to the class of things is the source, persons also being included in respect of such properties as belong to them in common with things. *Personal* evidence is that which is afforded by a human agent, either in the way of discourse, or by voluntary signs.

Distinguish between (a) direct and indirect, (b) real and personal, (c) original and derivative, evidence.
C. U. 1902.

III. The next division of evidence is that all evidence

is either *original* or *unoriginal*. By *original* evidence is meant evidence either *ab intra* or *ab extra*, which has an independent probative force of its own; *unoriginal*, also called *derivative*, *transmitted* or *second-hand* evidence, is that which derives its force from, through or under, some other. And of this derivative evidence there are five forms.—(a) When supposed oral evidence is delivered through oral; this is *hearsay* evidence in the strict and primary sense of the term. (b) When supposed oral evidence is delivered through written. (c) When supposed written evidence is delivered through written. (d) When supposed written evidence is delivered through oral. (e) When real evidence is reported either by word of mouth or otherwise.

IV. Evidence is either *pre-appointed*, otherwise called *pre-constituted*, or *casual*. Pre-appointed evidence is defined by Bentham to be where "the creation or preservation of an article of evidence has been either to public or private minds an object of solicitude, and thence a final cause of arrangement taken in consequence; (*viz.* in the view of its serving to give effect to a right or enforce an obligation on some future contingent occasion); the evidence so created and preserved comes under the notice of *pre-appointed* evidence." Under the head come public documents, such as regards registers, etc. together with deeds, wills, contracts, and other instruments for the facilitating of proof on future occasions; which are drawn up by individuals either in compliance with the positive requirement of law or with a view to the convenience of themselves or others. Any evidence not coming under the head of "pre-appointed evidence" may be denominated "*casual* evidence."

(7) **Proved**—A fact is said to be *proved* when, after considering the matters before it, the Court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.

What is the meaning of "proved" as used in the Evidence Act?
C. U. '22 (a), '20 (a).
When is a fact said to be
(1) proved,
(2) disproved,
(3) not-proved?
C. U. '17 (a), '18 (a), '26(b);
Bom. '17 (b).

(8) **Disproved**—A fact is said to be *disproved* when, after considering the matters before it, the Court either believes that it does not exist, or considers its non-existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist.

Define :—
 "Disproved"
 C. U. 21
 (Suppl.).
 Define
 "proved"
 Mad. '17.

(9) **Not-proved**—A fact is said not to be proved when it is neither proved nor disproved. (S 3).

"Considering the matters before it."—According to the definition given in this section, "a fact is said to be proved when after considering *the matters before it*, the Court believes it to exist etc." Such matters are those brought before the Court by the parties or otherwise appearing in the particular proceedings. The Judge can not, (without giving evidence as a witness) import into a case his own knowledge of particular facts and should decide the rights of the parties litigating according to what is averred and proved. A judgment must be based on facts *before the Court* relevant and duly proved (S. 165 *infra*). It must not be based on the personal knowledge of the Judge or on materials which are not in evidence (38 Cal. 153; W & A. 113) See, however, Ss. 56-58 *infra*. The expression "matters before it" in the definition of the words "proved" and "disproved" includes matters which do not fall within the definition of the word "evidence." The material evidence is included within the expression "matters before it." The Legislature intentionally refrained from using the word "evidence" in this definition but used instead the words "matters before it." For instance, a fact may be orally admitted in Court. The admission would not come within the definition of the word 'evidence' as given in this Act, but still it is a matter which the Court, before which the admission was made, would have to take into consideration in order to determine whether the particular fact was proved

"Of things that do not appear and things that do not exist the reckoning in a court of law is the same. Explain, C. U. '28 (a), '18 (b). Is it necessary to qualify the statement by any provision of the Evidence Act? C.U. 1918(b).

or not. Similarly the result of a local investigation under the Civil Procedure Code must be taken into consideration by the Court though it does not come under the definition of the word "evidence" as given by the Act. (9 Cal. 363, 37 Cal. 467, 14 C. W. N. 422).

"The Evidence Act adopts the requirements of the prudent man as an appropriate concrete standard by which to measure proof."

Explain and justify, C. U. '25 (b), 27 (a).

"The standard of proof required by the Evidence Act is that of a prudent man"

Explain and discuss, C. U. 1928 (a).

"Believes it to exist or considers its existence so probable etc."—This sub-section is so worded as to

provide for two conditions of mind *first*, that in which a man feels absolutely certain of a fact, in other words, "believes it to exist," and *secondly* that in which, though he may not feel absolutely certain of a fact, he thinks it so extremely probable that a prudent man would, under the circumstances, act on the assumption of its existence (39 Cal. 255). Absolute certainty, amounting to demonstration is seldom to be had in the affairs of life and we are frequently obliged to act on degrees of probability which fall very far short of it indeed.

Practical good sense and prudence consist mainly in judging aught whether in each particular case, the degree of probability is so high as to justify one in regarding it as certainty and acting accordingly. A merchant receives intelligence that some firm is solvent, or that the rate of exchange will vary or that some change in the tariff will be introduced. A General get some information about the movements or resources of the enemy. The success of either will depend on his judging soundly and well when he ought to act on the assumption that what he hears is true or when prudence bids him assume it to be false. If he waited for absolute certainty, he would never act at all. In a like manner all that a Judge need look for is such a high degree of probability that a prudent man in any other transaction where consequences of mistake were equally important would act on the assumption that the thing was true. (But though mathematical demonstration is beyond our reach in judicial enquiries, still we are bound to act upon such degree of probabilities as may amount to a moral certainty; or in other words which pro-

duce in the minds of tribunal such conviction of the existence or non-existence of the facts in dispute, as leave no reasonable doubt in their minds).

Proof.—The terms “evidence” and “proof” are not synonymous. Proof is the establishment of facts in issue by proper legal means to the satisfaction of the Court. It is logically defined as the sufficient reason for assenting to a proposition as true. It is the *result* or *effect* of evidence while evidence is only the *medium* of proof*. Mr. Best says “It is clear that *evidence* of fact and *proof* of it are not synonymous terms. Proof (using the word in the sense of persuasion or belief brought in the mind) is the perfection of evidence; without evidence there can be no proof, although there may be evidence which does not amount to proof. Take the case, for instance, of a man found murdered at a spot towards which another had been seen walking a short time before; this would be *evidence* to show that the latter was the murderer but standing alone would be far from *proof* of it.”

What do you understand by proof?
C.U. '19 (b),
Mad. '16.

Proof considered as the establishment of material facts in issue in each particular case by proper and legal means to the satisfaction of the court is effected by (i) evidence or statements of witnesses, admissions or confessions of parties and production of documents, (ii) presumptions, (iii) judicial notice, (iv) inspection—which has been defined as the substitution of the eye for the ear in the reception of evidence, as in the case of observation of the demeanour of witnesses,

* The term *proof* is often confounded with that of evidence and applied to denote the *medium* of proof, whereas in strictness it marks merely the *effect* of evidence. Where the result of evidence is undoubting assent to the certainty of the event or proposition which is the subject matter of enquiry, such event or proposition is said to be *proved*; and according to the nature of the evidence on which such conclusion is grounded, it is either *known* or *believed* to be true. Our judgments, then, are the consequence of proof; and proof is that quantity of appropriate evidence which produces assurance and certainty; evidence therefore differs from proof as cause from effect (Wills Cr. Ev. 2).

- local investigation or the inspection of the instruments used for the commission of a crime. (W. & A. 112)

Disproved and not-proved.—In criminal prosecution 'fact disproved' and 'fact not-proved' against the accused will have the same effect, for the accused will get the benefit of doubt. All civilized people feel a sort of strong abhorrence against convicting an innocent man ; hence an accused person is not to be convicted unless the charge is *proved* against him to a moral certainty. But in civil suits having regard to the consideration of burden of proof, a suitor may win in whose favour there is *preponderance of probability*.

Is there any difference as to the effect of evidence in civil and criminal proceedings ?
Cal. 20 (a),
Mad. '17.

Difference between probative force of evidence in civil and criminal cases—The *rules of law* are in general the same in civil and criminal proceedings and there is no law in the country which recognises different degrees of proof in different cases (10 Cal. 891). The definition of the term 'proved' is the embodiment of a sound rule of common sense and no distinction is observed in the Act between the degree of proof requisite for criminal as distinguished from civil proceedings. But a distinction has sometimes been drawn between the probative *effect* of evidence in civil and criminal cases and the doctrine has been laid down that a fact may be regarded as proved for civil purposes though the evidence would not sustain it for the purpose of a criminal conviction. "There is" says Mr. Best "a strong and marked difference as to the *effect* of evidence in civil and criminal proceedings. In the former, a mere, preponderance of probability, due regard being had to the burden of proof, is a sufficient basis of decision ; but in the latter, especially when the offence charged amounts to treason or felony, a much higher degree of assurance is required. The serious consequences of an erroneous condemnation both to the accused and society, the immeasurably greater evil which flows from it than an erroneous acquittal have induced the laws of every wise and civilized nation to lay down the principle, though

often lost sight of in practice, that the persuasion of guilt ought to amount to a moral certainty or as an eminent Judge expressed it, such a moral certainty as convinces the minds of the tribunal, as responsible men, beyond all reasonable doubt." In mere civil disputes when the violation of the law is in question, and no legal presumption operates in favour of either party, the preponderance of probability, due regard being had to the burden of proof, may constitute a sufficient ground for verdict ; but to affix on any person the stigma of crime requires a higher degree of assurance ; and juries will not be justified in taking such a step, except on evidence which excludes from their minds all reasonable doubt. (Tailor). Thus, in a civil case, a Judge of fact must find for the party in whose favour there is a preponderance of proof, though the evidence is not entirely free from doubt. In a criminal case no weight of preponderant evidence short of that which excludes all reasonable doubt is sufficient. Unbiased moral conviction is no sufficient foundation for a verdict of guilty unless it is based on substantial facts leading to no other reasonable conclusion than that of guilt. In cases dependent on circumstantial evidence the incriminating facts must be incompatible with the innocence of the accused, and incapable of explanation on any other reasonable hypothesis than that of his guilt. Circumstantial evidence not furnishing conclusive evidence against an accused though forming a ground for grave suspicion against him, cannot sustain a conviction.

• **Difference in rules of evidence in civil and criminal cases.**—The following points of difference in the rules of evidence in civil and criminal cases may be noted :—

(1) The provisions relating to *confession, dying declaration, character, and the incompetency of the parties as witnesses* are wholly or, partially, peculiar to criminal law.

(2) In civil cases, the rule of evidence may be relaxed by

"The rules of evidence are in general the same in civil and criminal proceedings." Mention any three exceptions to the above statement.

Mad. 1916.
State some of
the more
important
provisions of
the law of
evidence
which are
peculiar to
criminal trials
and inapplica-
ble to the
trial of civil
cases. Is there
any difference
as to the
effect of
evidence in
civil and
criminal
proceedings ?
If so, what ?
C. U. 1907.

What do you
understand by
the following
expressions as
used in the
Evidence
Act :—"May
presume,"
"Shall
presume,"
and "Conclu-
sive proof" ?
C.U. 1913(b).
What is
meant by
"Presump-
tion" and
"Conclusive
proof" ?
C.U. '15 (a).
Define :—
"Conclusive
proof."
C. U. 21,
(supple.) ;
1926 (b).

consent of the parties or order of Court *e.g.*, proof by affidavits. It is not so in criminal cases.

(3) In civil cases issues may be proved by a *preponderance of evidence*. In criminal cases, issues must be proved *beyond a reasonable doubt*. The following general rules with regard to evidence in criminal cases may be laid down .—

(i) Criminality is not to be presumed . Until the prosecution makes out the case, innocence is to be presumed and the *onus* of proving everything essential to the establishment of the charge against the accused lies on the prosecutor.

(ii) The evidence must be such as to exclude to a moral certainty, every reasonable doubt of the guilt of the accused.

(iii) In matters of doubt, it is safer to acquit than to condemn ; for it is better that ten guilty persons should escape rather than one innocent should suffer.

(iv) There must be clear and unequivocal proof of the *corpus delicto* . (the fact of the commission of the crime).

(v) The hypothesis of delinquency should be consistent with all the facts proved.

(10) **May presume.**—Whenever it is provided by this Act that the Court *may* presume a fact, it *may* either regard such fact as proved, unless and until it is disproved, or may call for proof of it.

(11) **Shall presume.**—Whenever it is directed by this Act that the Court *shall* presume a fact, it *shall* regard such fact as proved unless and until it is disproved.

(12) **Conclusive proof.**—When one fact is declared by this Act to be *conclusive proof* of another, the Court shall, on proof of the one fact, regard the other as proved and shall not allow evidence to be given for the purpose of disproving it. (S. 4).

Presumption.—Presumption literally means "taking as true without examination or proof." It may be defined as "an inference, affirmative or disaffirmative, of the existence

of some fact drawn by a judicial tribunal, by a process of probable reasoning from some matter or fact, either judicially noticed, or admitted or established by legal evidence to the satisfaction of the tribunal. (Best). A presumption means a rule of law that Courts of Judges shall draw a particular inference from a particular fact, or from a particular evidence, unless and until the truth of such inference is disproved (Stephen's Digest). Presumptions are based upon that wide experience of a connection existing between the *facta probantia* and the *factum probandum* which warrants a presumption from the one to the other, whenever the two are brought into contiguity. Presumptions are drawn from the course of nature, for instance, that night will follow day, the seasons follow each other, deaths ensue from a mortal wound and the like, or from the course of human affairs, from a familiarity with the ordinary springs of human action, from the usages of society, domestic relationship and transactions in business. (Norton). Presumptions are of two kinds.—(A) Presumptions of fact; (B) Presumptions of law.

(A) *Presumptions of fact* or natural presumptions—are inferences which are naturally and logically drawn from experience and observation of the course of nature, the constitutions of human mind, the springs of human action, the usages and habits of society. These presumptions are generally rebuttable. Cl. (1) of the section appears to point at presumptions of fact and ss. 86-88 and 90 and 114 come under this head.

(B) *Presumptions of law* or artificial presumptions are inferences or propositions established by law in which the law peremptorily requires a certain inference to be made whenever the facts appear which it assumes as the basis of that inference. Presumptions of law are, in reality, rules of law and part of the law itself and the Court may draw the inference whenever the requisite facts are before it. Presump-

Distinguish presumption from proof and illustrate your answer by two examples, C. U. 19 (b). Define :—“conclusive proof.” All. 1916, 1917. Explain with illustration :—“May presume” and “conclusive proof.” C. U. 24 (b). Define and illustrate “presumption of law,” “presumption of fact.” Explain what is meant by the term presumption. How are they classified in the I. E. Act? Mad. 17. What is the difference between “may presume” and “shall presume” as used in the Indian Evidence Act C. U. 22 (a). Explain the difference between :—“May presume”

"shall presume" and "conclusive proof" as laid down in the I. E. Act. Has this difference anything to do with the burden of proof or shutting out of evidence of any party? C.U. 1915(a).

tions of law are based, like presumptions of fact, on the uniformity of deduction which experience proves to be justifiable; they differ in being vested by the law with the quality of a rule, which directs that they *must* be drawn; they are not permissive like natural presumptions which *may* or *may not* be drawn. Presumptions of law again differ in their force, according as they are *rebuttable* or *irrebuttable*. As to the former the presumption shall stand good only until it is disproved. The latter class or irrebuttable presumptions, the law holds conclusive.

Presumptions of law are of two kinds.—(1) *Rebuttable* or *disputable*: Cl. (2) of the section points at rebuttable presumption of law and ss. 79-85 and 89, 105, 107-111 come under this head. (2) *Conclusive* or *irrebuttable*, These are inferences which the law makes so peremptorily that it will not allow them to be overturned by any contrary proof, however strong. Cl. (3) of the section points at irrebuttable presumption of law and ss. 41, 112 and 113 of this Act and s. 82 of I. P. C. come under this head.

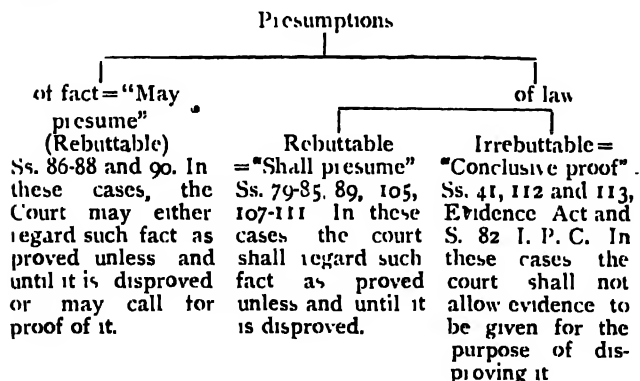
The Indian Evidence Act does away with all distinctions between presumption of fact and presumption of law and all presumptions are made to fall under one or other of the three classes mentioned in it.

"**May presume.**"—A Court where it *may* presume a fact has a discretion to presume it as proved or to call for confirmatory evidence of it, as the circumstances require. The Court may draw the inference which the facts suggest, at once, and call on the opposite party to disprove it or may refuse to draw any inference and call for proof of it independent of the facts by which the inference was suggested. The definition lays down that the Courts may draw a particular inference from a particular fact or evidence, may regard the fact as proved, unless and until it is disproved, that is, the burden of disproving lies on

the party against whom this presumption is made, or the Court having indicated the line of presumption, may call for proof of it in order to be able to regard the fact as proved *vide* Ss 86-88 and 111 *infra*.

"Shall presume."—In this case, it is not open to the Court to call for evidence to prove it so long as evidence to the contrary is not forthcoming. For instances of "shall presume" see Ss 79-85, 89 and 105 and 107-111 *infra*.

"Conclusive proof,"—In this case the Court cannot of its own accord call for evidence to disprove it nor can it allow any of the parties to tender evidence against it. For instances, see Ss. 41, 112, 113 *infra* and S 82 of the Penal Code.



CHAPTER II. Relevancy of facts (Secs. 5-55.)

This chapter deals with the relevancy of facts or with answer to the question "what facts may be proved in order to establish the existence of the right, duty or liability in dispute in a particular case." There is this much difference between the Indian Law and the English Law that whereas the former *positively* affirms what facts may be proved (Ss. 5-55) the latter assumes this to be known and merely declares *negatively* that certain facts shall not be proved.

This Chapter begins by declaring that "evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue and of such other facts as are hereinafter declared to be relevant and of no other." (S. 5). The expression "fact in issue" has already been defined in Sec. 3 *ante*. It now remains to see what is meant by the expression "relevant facts"; the Act, therefore, in the remaining sections (Ss. 6-55), of the chapter, proceeds to enumerate what comes within the category of relevant facts.

The law of evidence, as has been said before, is that part of the law of procedure which with a view to ascertain individuals rights and liabilities in particular cases, lays down —1. What facts may, and what may not, be proved in such cases. 2. What sort of evidence must be given of a fact which may be proved. 3. By whom and in what manner the evidence must be produced by which any fact is to be proved.

Define Relevant fact.
Under how many and what headings are they arranged in the Act?
Mad. 1917.

The present Chapter is concerned with the first of these questions, namely, the relevancy of facts. This Chapter declares to be relevant—

1. All facts in issue (S. 5) ;
2. All collateral facts, which—
 - (a) form part of the same transaction as the fact in issue (S. 6) ;
 - (b) are the immediate occasion, cause or effect of fact in issue (S. 7) ;
 - (c) show motive, preparation, or conduct affected by a fact in issue (S. 8) ;
 - (d) are necessary to be known in order to introduce or explain relevant fact (S. 9) ;
 - (e) are done or said by a conspirator in furtherance of a common design (S. 10) ;
 - (f) are either inconsistent with any fact in issue or relevant fact or renders its existence or non-existence highly probable or improbable (S. 11). ;

- (g) affect the amount of damages in cases where damages are claimed (S. 12) ;
- (h) show the origin or existence of a disputed right or custom (S. 13) ;
- (i) show the existence of a relevant state of mind or body (S. 14) ;
- (j) show the existence of a series of which a relevant fact forms a part (S. 15) ;
- (k) show the existence of a course of business (S. 16).

The remainder of the Chapter throws into a positive shape what in English law forms the exceptions to the rule excluding the various matters described as hearsay. They relate to—

- (1) the conduct of the parties on previous occasions (Ss. 52-55) ;
- (2) the statement of the parties on previous occasions (Ss. 17-31) ;
- (3) previous judgments (Ss. 40-44) ;
- (4) statements of other person (Ss 32-38) ;
- (5) opinions of third persons (Ss. 45-51).

What facts may be proved.—Evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue and of such other facts as are hereinafter declared to be relevant and of no others.* (S 5).

N.B.—This section shall not, however, enable any person to give evidence of a fact which might be relevant under this Act but which he is disentitled to prove by any provision of the law for the time being in force relating to Civil Procedure. (Expl.) For instance, a suitor does not bring with him and have in readiness for production at the first hearing of the case, a bond on which he relies. This section does not enable

Evidence may be given of—
(1) facts in issue and (2) relevant facts. Explain and illustrate :—
“Evidence must be directed and

* The principle of this Act differs from the English Law in that it defines the evidence which may be given, so that in order to produce any particular

confined to matters in issue but in certain cases, evidence as to matters not in issue may be given.

C. U. 21 (b).

him to produce the bond or prove its contents at a subsequent stage of the proceedings, otherwise than in accordance with the conditions prescribed by the Code of Civil Procedure.

Note.—This section declares that in any suit or proceeding evidence may be given to prove the existence or non-existence of every fact in issue and of such collateral facts as are declared to be relevant by some one or other of the remaining sections (6-55) of this Chapter and of no other facts. The last four words of the section “and of no others” clearly preclude a party from proving any *facts not in issue* or not declared relevant by any of the remaining sections of this chapter. To establish the relevancy of any fact it must therefore be shown that it is either (a) a *fact in issue* or (b) a fact such as is hereinafter declared to be relevant. As a general rule evidence is to be confined strictly to the issue.*

Difference between English Law and Indian Law.

evidence it must be shewn to be admissible under some section of this Act; whereas the principle of the English Law is to assume that every thing is admissible subject to two main exceptions, namely—(a) That the best evidence that is available must be rendered and that best evidence only (b) Thus hearsay evidence is not admissible. Working on these main principles the law is chiefly concerned with exceptions to these general rules. The first of these English rules is nowhere expressly laid down in the Act but it can be inferred by the exclusion of secondary evidence, by the exclusion of statements of persons not called as witnesses except in special cases, and by the presumption which is to be drawn from the absence of material witnesses or document. The rule excluding hearsay is dealt with in sections 32 and 33 (Field)

Explain the two-fold grounds of irrelevancy stated by Best, C. U. 1918 (a).

* Of all rules of evidence, the most universal and the most obvious is this—that the evidence adduced should be alike directed and confined to the matters which are in dispute, or which form the subject of investigation. The theoretical propriety of this rule never can be matter of doubt, whatever difficulties may arise in its application. The tribunal is created to determine matters which either are in dispute between contending parties, or otherwise require proof and anything which is neither directly nor indirectly relevant to those matters ought at once to be put aside as beyond the jurisdiction of the tribunal, and as tending to distract its attention and to waste its time. Evidence may be rejected as irrelevant for two reasons: (1) that the connection between the principal and evidentiary facts is too remote and

Collateral facts generally speaking are not admissible in evidence. The object of the subsequent sections (Ss. 6-55) of this chapter is to point out in what cases and in what manner, collateral facts are relevant and as such may be proved. If any collateral facts may be shewn to be relevant under the provisions of Ss. 6-55, then they are admissible in evidence. Referring to this section, Sir Henry Cunningham says :—"The force of the section lies in the last four words. Relevancy is the test of admissibility. The Judge may, as is provided by S. 136, ask in what manner a fact which it is proposed to prove can be relevant and he must admit the evidence only if he thinks that the alleged fact would be relevant. To establish the relevancy of fact, it must be shown that it is a fact such as is hereinafter (*i.e.* in the remaining sections of the chapter) declared to be relevant."

Rules respecting judicial evidence may be generally divided into (1) those relating to *quid probandum* or things to be proved, and (2) those relating to *modus probandi* or mode of proving. There is but one general rule of evidence, *viz*, that "the best evidence of which the nature of the case is susceptible, must always be produced." The two applications of the principle are as follows :—(1) With regard to the *quid probandum*, the law requires as a condition to the admissibility of evidence, an open and visible connection between the principal and the evidentiary facts. This connection must be reasonable and proximate, not conjectural and remote. This is the theory of relevancy and is dealt with Ss. 6-55 of this Act. The first question therefore which the law of evidence should decide is :—What facts are relevant and may be proved ? (2) Next, with regard to the *modus probandi*, the law rejects derivative evidence, such as the so-called hearsay evidence and exacts original evidence

What is meant by the rule that "the best evidence is to be adduced to prove questions in dispute" and illustrate your answer by reference to the chief applications of the principle. C. U. 16 (b), 1900, 1902.

What are the rules of evidence with regard to *quid probandum* ? 1916 (a).

conjectural ; (2) that it is excluded by the state of pleadings, or is rendered superfluous by the admission of the party against whom it is offered. (Bent)

"But evidence must always be given." Explain fully with reference to the specific provisions of the I. E. Act, C. U. '28(a), '23(b). [See also Notes under S. 61 *infra*].

Distinguish between a fact in issue and a relevant fact. Illustrate each with reference to a charge of murder and a suit for damages for libel respectively. Bom. '18 (a).

prescribing that no evidence shall be received which shows on its face that it only derives its force from some other which is withheld. In other words, *the best* evidence must given.

Facts in issue.—See *ante*. Facts may be related to rights and liabilities in one of two different ways :—

(1) They may by themselves, or in connection with other facts, constitute such a state of things that the existence of the disputed right of liability would be a legal inference from them. From the fact that A is the eldest son of B, there arises of necessity the inference that A is by the law of England the heir-at-law of B and that he has such rights as that status involves. From the fact that A caused the death of B under certain circumstances, and with a certain intention or knowledge, there arises of necessity the inference that A murdered B, and is liable to the punishment provided for by law for murder. Facts thus related to a proceeding may be called "facts in issue", unless their existence is undisputed. (What facts are in issue in particular cases is a question to be determined by the substantive law, or in some instances by that branch of the law of procedure which regulates the forms of pleading, civil or criminal).

(2) Facts which are not themselves in issue in the sense above explained, may effect the probability of the existence of the facts in issue and be used as the foundation of inferences respecting them ; such facts are described in the Evidence Act as relevant facts.

All the facts which it can in any event be necessary for Courts of justice to concern themselves, are included in these two classes. The first great question, therefore, which the law of evidence should decide is, what facts are relevant. The answer to this question is to be learnt from the general theory of judicial evidence explained in this chapter.

Relevancy and admissi-

Relevant facts.—See *ante*. A fact is relevant to another fact when the existence of the one can be shewn to be the

cause or one of the causes or the effect or one of the effects of the existence of the other, or when existence of the one, either alone or together with other facts, renders the existence of the other highly probable or improbable according to the common course of events. Any fact which satisfies this test is logically relevant : but it must be also legally relevant in order to ensure its admissibility in judicial evidence. A Judge can reject a fact though logically relevant, if in his opinion and under the circumstances of the case it be considered essentially misleading. Very often public policy, considerations of fairness and the necessity for reaching speedy decisions necessarily cause the rejection of so much of the evidence entirely relevant. Thus *all evidence that is admissible is relevant, but all that is relevant is not necessarily admissible. Relevancy is the genus of which admissibility is a species.*

Under the Evidence Act a fact is said to be relevant to another when the one is connected with the other in any of the ways referred to in sections 6-55. Facts which would satisfy the provisions of these sections would be *relevant* under the Act ; but it does not therefore follow that they would always be *admissible* under Ss. 91-99, 115, 121 130. Thus, for instance, communications between husband and wife during marriage, professional communications between a party and his legal adviser and official communications which would otherwise be relevant under the Act are inadmissible on the ground of public policy.

What are relevant facts ? Section 6 and the remaining sections of his chapter enumerate what are relevant facts under the Evidence Act. These sections are by far the most important and original part of the Evidence Act. They affirm *positively* what facts may be proved, whereas the English law assumes this to be known and merely declares *negatively* that certain facts shall not be proved. Except those facts as are mentioned in these sections, no

bility distinguished
What do you understand by "relevant facts" ?
C. U. '23 (b),
'28 (a).

What is necessary to make a fact relevant ?
Are all relevant facts admissible under the Act ? Illustrate your answer.
C. U. '15 (b).
'Relevancy and admissibility are not co-extensive terms."

Give instances of and reasons for this rule.
Bom. 1899.
Are all facts, declared relevant by the Evidence Act admissible under Part II of the Act ?
C. U. '11 (a).
When may a court reject evidence as irrelevant ?
C. U. '20 (a).

Explain with illustration "Relevant

fact," other fact will be deemed relevant according to the provisions of this Act. A law student must be well-grounded on the question of relevancy of facts as laid down in the following sections.

Facts declared relevant under the Act may be conveniently arranged under the following five headings :—

I. Facts and events connected with the facts in issue : (Ss. 6-16).

II. Statements : (Ss. 17-38). This comprises :—

(a) Admissions (Ss. 17-20 and 31) ;

(b) Confessions (Ss. 24-30) ;

(c) Statements by persons who cannot be called as witnesses (Ss. 32-33) ;

(d) Statements made under special circumstances (Ss. 34-38) ;

III Judgments in other cases (Ss. 40-44) ;

IV. Opinions of third persons (Ss. 45-50) ;

V. Character and reputation of parties (Ss. 52-55).

In forming an opinion about a fact one would naturally consider *1st*—anything which has happened or been done in connection with it ; *2ndly*—anything which has been said about it ; *3rdly*—anything that has been decreed in Courts of justice about it ; *4thly*—anything that has been or is thought about it ; and *5thly*—the character and reputation of parties concerned. Under these five headings, accordingly, all relevant facts under the Act have been arranged ; under some one of them every fact which claims to be relevant must be shown to fall. Many relevant facts, moreover, will fall under more than one of them, as the headings are inclusive and not exclusive of one another.

1. **Facts and events connected with facts in issue.**—The first class of relevant facts are facts and events connected with the facts in issue. This class comprises :—

1. Facts so connected with a fact in issue as to form part of the same transaction (S. 6).

2. Facts which are the occasion, cause or effect, of relevant facts or facts in issue (S. 7).

3. Facts showing a motive, preparation for, or previous and subsequent conduct in relation to, any fact in issue or relevant fact (S. 8).

4. Facts (a) necessary to explain or introduce a fact in issue or relevant fact, or (b) which support or reject an inference suggested by such a fact, or (c) which establish the identity of any thing or person whose identity is relevant, or (d) which fix the time or place at which any fact, in issue or relevant, happened, or (e) which show the relation of parties by whom any such fact was transacted (S. 9).

5. Any thing said, done or written by a conspirator in reference to the common intention of all conspirators (S. 10).

6. Facts (a) that are inconsistent with any fact in issue or relevant fact : or (b) which make the existence of any fact in issue or relevant fact highly probable or improbable. (S. 11).

7. Facts which will enable the Court to determine the amount of damages which ought to be awarded, when the suit is for that relief (S. 12).

8. Where the question is as to the existence of any right or custom—(a) any transaction by which the right or custom was created, claimed, modified, recognised, asserted, or denied, or which was inconsistent with its existence ; and (b) particular instances in which the right or custom was (i) claimed, recognised or exercised or (ii) disputed, asserted or departed from (S. 13).

9. Facts showing the existence of any state of (a) mind, (b) body or (c) bodily feeling when such state of mind or body is relevant (S. 14).

10. When the question is whether an act was accidental or intentional, the fact that it formed part of a series of similar occurrences (S. 15).

11. Existence of any course of business according to

which an act regarding which there is a question would have been done (S. 16).

We shall now proceed to deal with these more fully.

Facts forming part of the same transaction as the fact in issue.

1. Facts which though not in issue, are so connected with a fact in issue as to form part of the same transaction, are relevant, whether they occurred at the same time and place or at different times and places (S. 6).

Illustrations.—(a) A is accused of the murder of B by beating him. Whatever was said or done by A or B or the by-standers at the beating or so shortly before or after it as to form part of the transaction, is a relevant fact.

State the relevant fact in connection with the following case :—

A sues B for a libel contained in a letter forming part of a correspondence. Punj. '15.

(b) A is accused of waging war against the Queen by taking part in an armed insurrection in which property is destroyed, troops are attacked, and goals are broken open. The occurrence of these facts is relevant, as forming part of the general transaction, though A may not have been present at all of them.

(c) A sues B for a libel contained in a letter forming part of a correspondence. Letters between the parties relating to the subject out of which the libel arose, and forming part of the correspondence in which it is contained, are relevant facts though they do not contain the libel itself.

(d) The question is, whether certain goods ordered from B were delivered to A. The goods were delivered to several intermediate persons successively. Each delivery is a relevant fact.

Note :—This and the following sections of this chapter deal with *circumstantial* or indirect evidence and they describe the connexion which must exist between the principal fact or the fact in issue (*factum probandum*) and the evidentiary facts or collateral facts put forward in proof of it, in order to make the latter admissible in evidence.

The section enables a party to give evidence of any collateral facts which are not in issue *provided* that they are so closely connected with a fact in issue as to form part of the same transaction. These are allowed to be put in to make the evidence as to facts in issue more intelligible. The principal fact may not suffice for the deduction of a legal inference, but the principal fact in conjunction with other collateral facts may constitute such a state of things that the inference of the right or liability in question becomes inevitable. Hence the collateral facts are admissible in evidence.

"A transaction is a group of facts so connected as to be referred to by a single legal name, as a crime, a contract, a wrong or any other subject of inquiry which may be in issue. Every fact which is part of same transaction as the fact in issue is deemed to be relevant to the facts in issue although it may not be actually in issue, and although if it were not part of the same transaction it might be excluded as hearsay." (Stephen). Facts forming part of the same transaction or *res gesta*, in most cases, could not be excluded without rendering the evidence unintelligible, for every part of a transaction is connected with every other as cause and effect. Mr. Taylor says : "The affairs of men consist of a complication of circumstances, so intimately interwoven, as to be hardly separable from each other. Each owes its birth to some preceding circumstance and in its turn becomes the prolific parent of others ; and each during its existence has its inseparable attributes and its kindred facts materially affecting its character, essential to be known in order to a right understanding of its nature. These surrounding circumstances may always be shewn along with the principal fact provided they constitute parts of what are termed *res gesta*."

The question whether any particular fact is or is not a

part of the same transaction as the fact in issue is one of law and for the Judge to decide.

"Whether they occurred at the same time and place etc."—Facts may be part of the same transaction, though they may not have occurred at the same time and place. *Vide* ill (b).

Facts which are the occasion, cause or effect of facts in issue or relevant facts.

2. Facts which are the occasion, cause or effect, immediate or otherwise, of relevant facts or facts in issue, or which constitute the state of things under which they happened, or which afforded an opportunity for their occurrence or transaction, are relevant. (S. 7)

Illustrations.—(a) The question is, whether A robbed B. The facts that, shortly before the robbery, B went to a fair with money in his possession, and that he shewed it, or mentioned the fact that he had it, to third persons are relevant.

(b) The question is whether A murdered B. Marks on the ground, produced by a struggle at or near the place where the murder was committed, are relevant facts.

State the relevant facts in connection with the following case :—The question is whether A poisoned B. *Punj.* '15.

(c) The question is whether A poisoned B. The state of B's health before the symptoms ascribed to poison, and habits of B, known to A, which afforded an opportunity for the administration of poison, are relevant facts.

Note.—This section provides for the admission of several classes of facts which though not properly forming part of the same transaction as the fact in issue (S. 6), are yet connected with it in particular modes and as such are relevant when the transaction itself is under enquiry. These modes of connexion are (1) as being the *occasion* or *cause* of a fact; (2) as being its *effect*; (3) as constituting the *state of things* under which it happened; (4) as giving *opportunity* for its occurrence. The reason for the admission of facts of this nature is that, if it is desired to decide whether a fact occurred or not, almost the first natural step

is to ascertain whether there were facts at hand, calculated to produce or afford opportunity for its occurrence or facts which its occurrence was calculated to produce. Further, in order to the proper appreciation of a fact, it is necessary to know the state of things under which it occurred. Illustration (a) is an instance of facts relevant as giving *occasion* or *opportunity*; ill (b) of facts constituting an *effect*; ill. (c) of facts constituting *the state of things* under which an alleged fact happened.

3. (1) Any fact is relevant which shows or constitutes a motive¹ or preparation² for any fact in issue or relevant fact

Facts showing motive, preparation or previous or subsequent conduct in relation to any fact in issue or relevant fact

(2) The conduct³ of any party (or of any agent to any party), to any suit or proceeding, in reference to such suit or proceeding, or in reference to any fact in issue therein or relevant thereto, and the conduct of any person an offence against whom is the subject of any proceeding, is relevant, if such conduct, influences or is influenced by, any fact in issue or relevant fact, and whether it was previous or subsequent thereto. (S. 8).

(3) The word "conduct" in this section does not include statements, unless those statements accompany and explain acts other than statements, but this explanation is not to affect the relevancy of statements under any other section of this Act⁴. Expl. 1).

(4) When the conduct of any person is relevant, any statement made to him or in his presence and hearing, which affects such conduct, is relevant.⁵ (Expl. 2.)

1. *Vide* illa. (a) and (b). 2. *Vide* illa. (c) and (d).

3. *Vide* illa. (e) and (f).

4. *Vide* illa. (j) and (h). 5. *Vide* illa. (f), (g) and (h).

Illustrations.—(a) A is tried for the murder of B. The facts that A murdered C, that B knew that A had murdered C, and that B had tried to extort money from A by threatening to make his knowledge public, are relevant.

State the relevant facts in connection with the foll. case :—A sues B upon a bond for money. B denies the bond.
Punj. 1915.

(b) A sues B upon a bond for the payment of money. B denies the making of the bond. The fact that, at the time when the bond was alleged to be made, B required money for a particular purpose, is relevant.

(c) A is tried for the murder of B by poison. The fact that before the death of B, A procured poison similar to that which was administered to B, is relevant.

(d) The question is, whether a certain document is the will of A. The facts that not long before the date of the alleged will, A made inquiry into matters to which the provisions of the alleged will relate, that he consulted Vakils in reference to making the will, and that he caused drafts of other wills to be prepared, of which he did not approve, are relevant.

State the relevant facts in connection with the foll. case :—A is accused of a crime.
Punj. 1915.
[See also ill. (c) to S. 9 and ill. (p) to S. 14.]

(e) A is accused of a crime. The facts that, either before, or at the time of, or after the alleged crime, A provided evidence which would tend to give the facts of the case an appearance favourable to himself or that he destroyed or concealed evidence, or prevented the presence or procured the absence, of persons who might have been witnesses, or suborned persons to give false evidence respecting it, are relevant.

(f) The question is whether A robbed B. The facts that, after B was robbed C said, in A's presence—'the police are coming to look for the man who robbed B', and that immediately afterwards A ran away, are relevant.

(g) The question is, whether A owes B rupees 10,000. The fact that A asked C to lend him money, and that D said to C in A's presence and hearing—'I advice you not to trust A for he owes B 10,000 rupees, and that A went away without making any answer, are relevant facts.

(h) The question whether A committed a crime. The fact that A absconded after receiving a letter warning him that inquiry was being made for the criminal, and the contents of the letter are relevant.

(i) A is accused of a crime. The facts that, after the commission of the alleged crime, he absconded, or was in possession of property or the proceeds of property acquired by the crime, or attempted to conceal things which were or might have been used in committing it, are relevant. Punj. 1915.

(j) The question is, whether A was ravished. The facts that shortly, after the alleged rape, she made a complaint relating to the crime, the circumstances under which, and the terms in which, the complaint was made, are relevant. The fact that, without making a complaint, she said that she had been ravished is not relevant as conduct under this section, though it may be relevant—as a dying declaration under section 32, clause 1, or as corroborative evidence under section 157.

(k) The question is, whether A was robbed. The fact that, soon after the alleged robbery, he made a complaint relating to the offence, the circumstances under which, and the terms in which the complaint was made are relevant. The fact that he said he had been robbed without making any complaint is not relevant as conduct under this section, though it may be relevant—as a dying declaration under section 32, clause 1, or as corroborative evidence under section 157.

Note.—Facts showing *motive* or *preparation* for a fact in issue or relevant facts; *previous* or *subsequent* conduct of parties or their agents in any suit or proceeding; the conduct of any person an offence against whom is the subject of any proceeding *i.e.*, the conduct of the complainant; At the trial of A for the murder of B by poison, the following evidence is tendered for the

* Ill (d) refers to *previous* conduct; ill (e) to *previous* and *subsequent* conduct of the accused.

prosecution :
 —(a) That A owed B money which he could not pay ; (b) That a quantity of this poison had recently been purchased by A ; (c) That A told several people before B's death that B's health was breaking down ; (d) That A told several people before B's death that he would poison the whole neighbourhood ; (e) That after B's death A absconded ; (f) That A gave general retainer to an eminent Counsel the day after the alleged murder. State giving reasons, which of those facts are and which are not, admissible in evidence against A. Bom. '16 (b). [For (a) to (c) & (e) to (f) see S. 8 ; for

statements made to or in the presence of the parties which affect their conduct, are all declared relevant under this section. Illustrations (a) and (b) are instances of facts showing *motive*, Ills. (c) and (d), *preparation*, Ills. (e) and (f), *conduct* of a party to the proceeding ; Ills. (g) and (h), of *statements affecting conduct* and Ills. (i) and (k), of *statements accompanying and explaining acts*.

Motive or preparation.—Where there is a question as to whether a particular act was done by a person, then any fact which in any way supplies or furnishes a motive or which in any way constitutes a preparation for it becomes a relevant fact and is admissible in evidence. In the consideration of the cause or occasion of a fact, and the state of things under which it happened, nothing can be more material than to know whether any person had an interest in its happening or took any measures calculated to bring it about. Thus *motive* and *preparation* become of the utmost importance. If A is found murdered, the fact that B had a strong motive for wishing A dead, is so far as it goes, a piece of evidence against B. So if A is poisoned with arsenic, the fact that B shortly before, procured arsenic or made arrangements by which he would have access to A's food points to B being the poisoner, and would be a relevant fact at his trial. (Cunningham).

Motive.—A motive is strictly, what its etymology indicates, the which *moves* a man to do a particular act. There be no action without a motive, which must exist for every voluntary act. In criminal cases the motive with which a person commits an offence are very material. Ills. (a) and (b) to this section and Ills. (d) and (f) to section 43 *infra* give examples of motive. Where A was tried for the murder of B, the fact that at the instigation of A, B murdered C long before B's murder, and that A, at about that time, used expressions of malice against C, were held to be relevant as forming motive, on the part of A who

murdered B. (4 C. & P. 221). The existence of motive is an important element in a chain of presumptive proof ; as when a person, accused of having set fire to his house, has previously insured it to an amount exceeding its value ; or where a man accused of the murder of his wife, has previously formed an adulterous connection with another woman etc. On the other hand, the absence of any apparent motive is always a fact in favour of the accused ; although the existence of motives invisible to all except the person who is influenced by them must not be overlooked (Best). (d) see S. 14-
expl. (1) &
ill. (p)]

Preparation.—Preparation is also relevant it being obviously important in the consideration of the question whether a man did a particular act or not to know whether he took any measures calculated to bring it about. *Vide* ill. (c) and (d). Where the question is whether A committed an offence, the fact of his having procured the instruments which were used in its commission, is relevant (*R. v. Palmer*). “As preparations must necessarily precede the commission of premeditated crime, some traces of them may generally be expected to be discovered ; and if there be not clear and decisive proof of guilt, the absence of any evidence of such preliminary measures is a circumstance strongly presumptive of innocence.” (Will’s Cir. Ev. 53).

Conduct of a party.—Preparation is an instance of previous conduct of the party influencing the fact in issue or the relevant fact but other conduct also whether of a party or of his agent, whether previous or subsequent, and whether influencing or influenced by a fact in issue or relevant fact, is also admissible, the conduct of a party being always extremely relevant. Para 2 of the section provides for conduct of three kinds :—(1) Conduct of any party or of his agent to a civil suit or criminal proceeding in reference to such suit or proceeding ; (2) Conduct in reference to any fact in issue therein or relevant thereto ; (3) Conduct of the person an offence against whom is the subject of any

proceeding *i.e.*, of the complainant.* The conduct made relevant by this section must be conduct which directly and immediately influences or is influenced by, any fact in issue or relevant fact. It does not include actions resulting from some intermediate cause, such as questions or suggestions. (7 All. 385 F. B. ; *contra* per Mahamood J.) A was tried for murder of one D. The deceased shortly before her death, was questioned by various persons as to the circumstances in which the injuries had been inflicted on her. The deceased was unable to speak but was conscious and able to make signs. Evidence was offered and admitted to prove the questions put to D and the signs which he had made in answer to such questions. *Held* by the majority of the Full Bench that the signs could not be proved as "conduct" within the meaning of S. 8, Evidence Act, in as much as taken alone and without reference to the questions leading to them there was nothing to connect them with the cause of death and so to make them relevant. But Mahmood J. *held* that the signs made by the deceased were the conduct of a person an offence against whom was the subject of any proceeding and was therefore relevant. (*Ibid*). What is meant by the words, "*if such conduct influences or is influenced by any fact in issue or relevant fact*," is that there must be a direct or immediate relation between the conduct and the fact in issue. Conduct which is brought about by some other agency though connected with the facts in issue is not relevant conduct. Illustrations (e) and (f) to this section and illustration (c) to sec. 9 show what is meant by relevant conduct. The distinction between character and conduct must not be overlooked. Evidence of conduct with reference to the particular transaction or to connected transactions

* The accused in a criminal proceeding is no doubt a party to the proceeding, but the complainant is not a party, for in all criminal cases Crown is the prosecutor ; therefore, the conduct of the complainant is separately mentioned in the phrase "conduct of any person an offence against whom is the subject of any proceeding"

(Secs. 14 and 15) is admissible. Evidence of character is admissible in certain cases only [Secs. 52-55, Sec. 154 (4)—(*Cunningham*)].

Illustrations (j) and (k) are illustrations of statements accompanying and explaining the conduct of a person an offence against whom is being enquired into. Under these illustrations, the *terms* in which the complaint was made are relevant. A distinction is to be marked here between a bare *statement* of the fact of rape or robbery, and a *complaint*; because while a *complaint* is always relevant, a statement not amounting to a complaint will only be relevant under particular circumstances, *e.g.*, if it amounts to a dying declaration, or can be used as corroborative evidence (Norton). The present section so far as it admits a statement as included in the word "conduct" must be read in connection with secs. 25 and 26 *post* and cannot admit a statement as evidence which would be shut out by those sections. (14 Bom. 260).

In order to be relevant, the conduct need not be *contemporaneous*, although concurrence of time must always be considered as material to show the connection, it is by no means essential. Concurrence of time may, however, be important in estimating the *weight* to be given to the evidence when admitted.

Statements accompanying and explaining acts :* Explanation 1.—In English Law such statements

* This section admits statements only so far as they accompany and explain acts. Sec. 10 refers to statements made by conspirators; sec. 14, ill. (k), (l) and (m) refer to statements showing states of mind and body; Secs. 17-31 refer to admissions and confessions; Secs. 32-38 refer to statements made by deceased person or persons who cannot be called as witnesses and to statements made under special circumstances and Secs. 155 and 157 refer to former statements of witnesses. The sections mentioned above detail the circumstances under which particular statements, notwithstanding their inherent infirmity, may be admitted in evidence, under special circumstances. (T. P. Banerjee).

are admissible as forming part of the *res gestae*. This Explanation points out that mere statements, as distinguished from acts, do not constitute conduct. Ills. (f) and (g) clearly explain the meaning of this Explanation. The Explanation points to a case in which a person whose conduct is in dispute mixes up together actions and statements; and in such a case those actions and statements may be proved as a whole. For instance, a person is seen running down a street in a wounded condition and calling out the name of his assailants and the circumstances under which the injuries were inflicted: here what the injured person says and what he does, may be taken together and proved as a whole. (7 All. 385).

A statement may be admissible, not as standing alone, but as explaining conduct in reference to relevant facts. Conduct may be equivocal without statements explanatory and elucidatory of it. Statements accompanying acts are in fact part of the *res gestae* just as much as the acts themselves. They are often absolutely necessary to show the *animus* of the actor. They have been styled verbal acts, (*Norton*).

The declarations are not admissible simply because they accompany an act: the latter itself must be in issue or relevant; admissibility of such a statement depends upon the light it throws upon an act which is itself relevant. The Evidence Act makes those statements admissible and those only, which are the essential complements of acts done or refused to be done, so that the act itself or the omission to act requires a special significance as a ground for inference with respect to the issues in the cases under trial. (3 Bom. 12, 17).

The Explanation does not render admissible, as evidence, any statement which secs. 25 and 26 exclude and is not to be construed as if it were a proviso to these sections. (14 Bom. 260 F. B.)

Statements affecting conduct : Explanation II.—

It is a general rule that statements made in the presence of the prisoner, and which he might have contradicted, if untrue, is evidence against him. The provisions contained in this Explanation, make relevant statements made to or in the presence of a party whose conduct is in question, and which can be shewn in any way to affect such conduct. They are important in explaining a man's motive, intention etc. Ills. (f), (g) and (h) are instances of such statements. In order to make such statements relevant evidence against the party whose conduct is in question, it should be shown (1) that all what was said, written or done to him by others is shown to have come to his *actual knowledge*; (2) that by such statements his conduct is likely to have been affected; and 3) that he had an opportunity of replying to or contradicting the allegations made against him. Before the words of a third person are let in, it must be shown, according to this Explanation, that the conduct which they are alleged to affect is relevant (7 All. 385 F. B.)

The statements whether oral or written *must affect conduct*; if they cannot be shewn to have done so, they are inadmissible under this section. Thus, if a man accused of a crime is silent, or flies or is guilty of false or evasive responson, his conduct is, coupled with the statements, in the nature of an admission, and therefore evidence against himself. His flight or false responson would be equivocal *per se*, and might be unintelligible without our knowledge of what led to it. His acts upon the statement, and the statement are so blended together, that both form part of the *res gestae*, and on this ground again the statement is as receivable as the act. In point of fact, it is the conduct of the party upon the statement being made, that is the material point, the statements themselves are only material as leading up to and explaining that. (Norton) In the case of statements, made to, or in a party's presence he may either reply

to them or keep silent [Ill. (g)] or his conduct may be otherwise affected by them. [Ills. (f), and (h).] But a party's silence will render statements made in his presence evidence against him of their truth only when he is reasonably called on to reply to such statements. The saying that 'silence gives consent' must not be taken without qualifications, for it would be a mistake always to infer that a man who does not repudiate an allegation admits the truth of it. (29 Bom. 476, 46). A statement may be a mere impertinence and best rebutted by silence, and specially when the observations are not addressed to a man himself, but merely made in his presence, he may be under no obligation to take notice of them." (Cunningham.) The words "statements made to him" in Expl. 2 would seem to include letter addressed to a person and shewn to have come to his knowledge, and an adverse inference may be drawn from the fact of his not answering them. But the English law is different. Lord Tenterden in *Fairlie v. Denton* (3 C. & P. 103) observed ; "What is said to a man before his face, he is in some degree called upon to contradict, if he does not acquiesce in it ; but not answering a letter is quite different, and it is too much to say, that a man, by omitting to answer a letter at all events admits the truth of the statements that letter contains." There is in general no duty cast upon the recipient of a letter to answer it, and his omission to do so does not amount to any admission of the truth of the statements contained in it. But it is otherwise if the writer is entitled to an answer ; so, in the case of a letter written by A to B, to which the position of the parties justifies A in expecting an answer—, as when the subject of it is a contract or negotiation pending between them—the silence of B may be important evidence against him. (Woodroffe). "The only fair way of stating the rule of law is that in every case you must look at all the circumstances under which the letter was written, and you must determine for yourself whether the circumstances are such

that the refusal to reply alone amounts to an admission." (*Per* Kay L. J. in 2 Q. B. 541).

4. Facts necessary to explain or introduce a fact in issue or relevant fact, or which support or rebut an inference suggested by a fact, in issue or relevant fact, or which establish the identity of any thing or person whose identity is relevant or fix the time or place at which any fact in issue or relevant fact happened, or which show the relation of parties by whom any such fact was transacted, are relevant, in so far as they are necessary for that purpose. (S. 9).

Facts necessary to explain or introduce, facts in issue or relevant facts.

Illustrations.—(a) The question is, whether a given document is the will of A. The state of A's property and of his family at the date of the alleged will may be relevant facts.

(b) A sues B for a libel imputing disgraceful conduct to A; B affirms that the matter alleged to be libellous is true. The position and relations of the parties at the time when the libel was published may be relevant facts as introductory to the fact in issue. The particulars of a dispute between A and B about a matter unconnected with the alleged libel are irrelevant, though the fact that there was dispute may be relevant if it affected the relations between A and B.

(c) A is accused of a crime. The fact that, soon after the commission of the crime, A absconded from his house, is relevant, under section 8, as conduct subsequent to and affected by facts in issue. The fact that at the time when he left home he had sudden and urgent business at the place to which he went, is relevant, under section 9 as tending to explain the fact that he left home suddenly. The details of the business on which he left are not relevant, except in so far as they are necessary to show that the business was sudden and urgent. Punj. 1915.

(d) A sues B for inducing C to break a contract of service made by him with A. C, on leaving A's service,

says to A—'I am leaving you because B has mad me a better offer.' This statement is a relevant fact as explanatory of C's conduct, which is relevant as a fact in issue.

A and B are charged with theft committed in 1914 in the house of a woman of the town ; evidence is brought forward to show that C and D committed a theft in the house of another woman of the town in 1918 in similar circumstances. Discuss whether the evidence is admissible under sec. 9 or 11 of the I. E. Act, to prove that A and B are the same persons as C and D. C.U. '20 (b). A and B were charged with theft committed in the house of a banker ; evidence was brought forward to show that C and D committed theft in the house of another banker

(c) A accused of theft, is seen to give the stolen property to B, who is seen to give it to A's wife. B says, as he delivers it—'A says you are to hide this.' B's statement is relevant as explanatory of a fact which is part of the transaction.

(f) A is tried for a riot and is proved to have marched at the head of a mob. The cries of the mob are relevant as explanatory of the nature of the transaction.

Note.—Section 7 deals with the admissibility of facts, which are the occasion, cause or effect of facts in issue or relevant facts. Section 8 similarly makes admissible facts showing motive or preparation for any fact in issue or relevant fact. The present section makes admissible facts which are necessary to explain or introduce a fact in issue or relevant fact. As sections 7 and 8 provide generally for the admission of facts *causative* of a fact, relevant or in issue, the present section may be said generally to provide for facts *explanatory* of any such fact. (Cunningham, 98) There are many incidents which, though they may not strictly constitute a fact in issue, may yet be regarded as forming part of it, in the sense that they accompany and tend to explain the main fact, such as, identity, names, dates, places description, circumstances and relations of the parties, and other explanatory and introductory facts of a like nature : such facts are receivable under this section. These explanatory facts are relevant only in so far as they are necessary for that purpose *i.e.*, to explain the fact in issue or relevant fact and no more ; for if all the incidents of a transaction are to be proved then the narrative may run down into purely irrelevant and unnecessary detail.

Illustrations (a), (b), (c), (d) and (f) illustrate the meaning of the expression "facts necessary to explain or

introduce a fact in issue or relevant fact ;" and the last clause of ill. (b) and (c) illustrate the meaning of the words "in so far as they are necessary for that purpose." The second clause of ill. (c) shows how an inference drawn from the act of absconding may be rebutted by an explanation that he left home suddenly on account of an urgent business. Ills. (d) and (e) indicate that explanatory statements are admitted under this section irrespective of the fact whether the person against whom it is made was present or not when it was made. A and B were charged with theft committed in 1914, in the house of a prostitute ; evidence was brought forward to show that C and D committed a theft in the house of another prostitute in 1918 in somewhat similar circumstances ; *held* that the evidence was not admissible either under sec. 9 or under sec. 11 of the Indian Evidence Act to prove that A and B were same persons as C and D. (*Emperor v. Panchu Das*, 31 C. L. J. 402.) See notes under S. 14 *supra*.

5. Where there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, anything said, done or written by any one of such persons in reference to* their common intention, after the time when such intention was first entertained by any one of them, is a relevant fact as against each of the persons believed to be so conspiring, as well as for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it. (S. 10)

Illustration.—Reasonable ground exists for believing that A has joined in a conspiracy to wage war against the Queen. The facts that B procured arms in Europe for the purpose

on another occasion in somewhat similar circumstances. Discuss whether the evidence is admissible under the I. E. Act, to prove that A and B were the same person as C and D. C.U. 1922(a).

Things said or done by conspirator in reference to common design.

Discuss the law of conspiracy as laid down in the Evidence Act. "Where various persons conspire to commit an offence or actionable wrong, each makes the rest his

* It should be noted that the words used in this section are "in reference to" and not "in furtherance of" and hence this section is wider than English Law.

agents to carry on the plan into execution."

• Develop this by giving reason.

C.U. 1926(b).

of conspiracy, C collected money in Calcutta for a like object, D persuaded persons to join the conspiracy in Bombay, E published writings advocating the object in view at Agra, and F transmitted from Delhi to G at Kabul the money which C had collected at Calcutta, and the contents of a letter written by H giving an account of the conspiracy, are each relevant, both to prove the existence of the conspiracy, and to prove A's complicity in it, although he may have been ignorant of all of them, and although the persons by whom they were done were strangers to him, and although they may have taken place before he joined the conspiracy or after he left it.

Note.—All acts and statements of conspirators in connection with or in explanation of the conspiracy are relevant under the section. Everything said or done by any of the conspirators in furtherance of the common objects is evidence against each and all of the parties concerned, whether they were present or absent. The principle underlying this section is substantially the same as that of principal and accessory or 'principal and agent. In 17 W. R. Cr. 15 Couch, C. J. remarked : "The rule of law is that where several persons are proved to have combined together for the same illegal purpose, any act done by one of the parties in pursuance of the original concerted plan and with reference to the common object is, in the contemplation of the law, the act of the whole. Each party is an agent of the others in carrying out of the objects of the conspiracy and doing anything in furtherance of the common design."

Conspiracy consists in an agreement between two or more persons to do an unlawful act or to do a lawful act by unlawful means. In order to prove the existence of the agreement or the participation of any given person in it, evidence may be given of anything done, said or written by any one of the alleged parties. The section provides that the things which it is thus proposed to prove must have been

done after the intention to conspire was conceived by one of the parties and with reference to the common intention. Evidence which satisfies these two conditions may be admitted for the purposes above-mentioned, when there is reasonable ground to believe that there was such an agreement or when an undertaking to prove the agreement is given to the satisfaction of the Judge. (Cunningham.)

The section applies as well to the case of a concerted agreement to commit an actionable wrong as to a criminal conspiracy. (Cunn. Ev. 26-30).

This section is not intended to make evidence, the confession of a co-accused and put it on the same footing as a communication passing between conspirators or between conspirators and other persons with reference to the conspiracy (15 C. W. N. 25).

Essential—In order to bring the section into operation, it must be shewn :—

(1) (a) That there is a reasonable ground for belief in the existence of the conspiracy,* and

(2) that the particular defendant against whom the facts are to be put in, was a party to the alleged conspiracy ;

(3) that the thing (act and declaration etc.) which is proposed to be given in evidence must have been done—

(a) with reference to the common intention, and

* The operation of sec. 10 is strictly conditional upon there being reasonable ground to believe that two or more persons have conspired together to commit an offence. (37 Cal. 467). "It is only reasonable, that, as a general rule, some *prima facie* and satisfactory evidence should in the first instance be given of the common purpose, before evidence of the acts in it by multitude of persons, who, but for such common purpose, would be absolute strangers, should be received. It is necessary to prove the existence of conspiracy and to connect the prisoner with it in the first instance, where you seek to give in evidence against him, the declaration of co-conspirator, and having done so, you are then at liberty to give in evidence against the prisoner acts done by any of the parties, whom you have connected with the conspiracy." (Norton.)

Proof of
conspiracy.

(b) after the intention to conspire was conceivable by one of the parties.

The section, has wider scope than English law for under this section, (i) it not necessary to show that the act was done in furtherance of the common design and (ii) act done after the termination of the conspiracy also relevant.

English law.—The provisions of the section is wider than English law, * under which the act or statement must have been done or made *in execution or furtherance of* the common purpose and acts or declarations of others are not admissible against a conspirator if done or made after his connection with the conspiracy has ceased. Under the English law, if the acts and declarations of the other conspirators were not in furtherance of the common purpose or were done or made after the person against whom the evidence is to be given had severed his connection with the conspiracy they will not be relevant against him.

This section, therefore, differs from the English law in two respects, namely—

(1) It is not necessary under this section to show that the act was done *in execution or furtherance of the conspiracy or common design*. Under this section anything said or done *in reference to the common intention* is admissible and thus the contents of a letter written by a co-conspirator giving an account of the conspiracy is relevant against the other, even though *not written in support of it or in furtherance of it*.

(2) Act done after the termination of the conspiracy is also relevant under this section. (This provision is contrary to

* When two or more persons conspire together to commit any offence or actionable wrong, everything said, done or written, by any one of them *in the execution or furtherance of their common purpose*, is deemed to be so said, done or written by every one and is deemed to be a relevant fact as against each of them, but statements made by individual conspirators as to measures taken in the execution or furtherance of any such common purpose are not deemed to be relevant as such as against any conspirators except those by whom or in whose presence such statements are made. Evidence of acts or statements deemed to be relevant under this Article may not be given until the Judge is satisfied that apart from them, there are *prima facie* grounds for believing in the existence of the conspiracy to which they relate." [Stephen's Digest, Art. 4].

the English rule according to which acts and declarations of others are not admissible against a conspirator if done or made after his connection with the conspiracy has ceased).

~~1/2~~ 6 Fact not otherwise relevant are relevant—

(1) if they are inconsistent with any fact in issue or relevant fact ; or

(2) if, by themselves, or in connection with other facts, they make the existence or non-existence of any fact in issue or relevant fact highly probable or improbable. (S. 11).

Illustrations.—(a) The question is whether A committed a crime at Calcutta on a certain day. The fact that on that day, A was at Lahore is relevant. The fact that, near the time when the crime was committed, A was at a distance from the place where it was committed which would render it highly improbable though not impossible, that he committed it, is relevant.

(b) The question is, whether A committed a crime. The circumstances are such that the crime must have been committed either by A, B, C or D. Every fact which shows that the crime could have been committed by no one else and that it was not committed by either B, C, or D, is relevant.

Note.—The object of a trial being the establishment or disproof by evidence of a particular claim or charge it is obvious that any fact which either disproves or tends to disprove or prove that claim or charge is relevant. "Any fact material to the issue which has been proved by the one side may be disproved by the other, whether the contradiction is complete, *i.e.*, inconsistent with a relevant fact under clause (1) or such as only to render the existence of the alleged fact highly improbable under clause (2). Again, facts may be put in evidence under clause (2) in *corroboration* of other relevant facts if they render themselves highly improbable." (Norton).

Facts inconsistent with facts in issue or relevant fact and facts making the existence or non-existence of fact in issue or relevant fact highly probable or improbable.

When do facts, not otherwise relevant become relevant ? Give illustration.
C.U. 1923(b),
1928 (a).

Explain how
evidence of
alibi becomes
relevant.
C.U. 1915(b).

By this section evidence of collateral facts is admitted either (1) to disprove a fact asserted on the other side or (2) to prove a fact asserted by the party who adduces the evidence. In the former cases, the facts must be inconsistent with or such as to render highly improbable the fact which it is desired to disprove. The common instance of an *alibi* furnishes an illustration. When the presence of an accused person at the place and at the time alleged by the prosecution is met by evidence that he was at the same time at another place so distant as to show that he could not possibly have been at the first mentioned place the evidence is relevant since it is inconsistent with the theory of the prosecution. It is equally admissible if it goes to show that his presence at the scene of the offence though not physically impossible was in the circumstances highly improbable. To use the language of S. 114, the Court may, "regard being had to the common course of material events" presume on the strength of such evidence that A in illustration (a) could not have been at Calcutta. Illustration (b) gives another case which may be thus stated in a concrete form. A warder who has been locked up in a jail with four prisoners A, B, C and D is found murdered and it is proved that no other person could have entered the jail, whence it appears that the murder must have been committed by one of the four. Evidence is tendered to show that B and C were chained up in cells and that D was paralysed. This evidence is admissible since it makes it highly probable that A committed the murder." (Cunningham).

While sec. 7 defines the meaning of the term 'relevancy' in quasi-scientific language the present section contains a statement in popular language of what in the former section is attempted to be stated in scientific language. The practical effect of these two sections is to make every relevant fact admissible in evidence. (Markby, 17-18.)

This section is not very happily worded. The terms of the section are wide enough to admit any fact which can show the inconsistency, probability or improbability of any fact in issue or relevant fact. Even hearsay evidence may be said to be admissible according to the wording of this section. It may, for instance be said : A (not called as a witness) was heard to declare that he had seen B commit a crime. This makes it highly probable that B did commit that crime. Therefore A's declaration is a relevant fact under sec. 11 (2). That this was not the intention of the section is shown by the elaborate provisions contained in the following part of the Chapter II (Ss. 32-39) as to particular classes of statements which are regarded as relevant facts either because the circumstances under which they are made invest them with importance or because no better evidence can be got. It could not have been the intention of the Legislature to admit totally irrelevant facts by the general provision in sec. 11. Cunningham in his comment on this section observes.—“In applying the section care must be taken not to put too liberal an interpretation on the expressions ‘probable’ and ‘improbable’. The co-existence of the collateral fact and the fact in issue must be probable or improbable in a high degree. The section is not intended to supersede all the other provisions of the Act regarding relevancy. In a case where in trial for forgery of a document other documents suspected to be forged which had been found in the prisoner's house were put in evidence the following observations were made on the section :—“Sec. 11 of the Evidence Act is, no doubt, expressed in terms so extensive that any fact which can, by a chain of ratiocination, be brought into connexion with another, so as to have a bearing upon a point in issue, may possibly be held to be relevant within its meaning. But the connexion of human affairs is so infinitely various and so far-reaching, that thus to take the section in its widest admissible sense, would be to complicate

What is the necessity of S. 11 of the Evidence Act ? Does it not apparently make all facts relevant ? Give two illustrations of fact which may be relevant under s. 11 only and not under any other section of the Evidence Act, C.U. 1911(a).

every trial with a mass of collateral inquiries limited only by patience and by means of the parties. That such an extensive meaning was not in the mind of the Legislature, seems to be shown by several indications by the Act itself. The illustrations to the section do not go beyond familiar cases in the English law of evidence. There must always be room for the exercise of discretion when the relevancy of testimony rests upon its effect towards making the affirmative or negative of a proposition 'highly probable'; and with any reasonable use of this discretion, the Court ought not to interfere, but it appears to me to be as illegal now as before the Evidence Act was passed to admit evidence of crime A in order to prove the cognate but unconnected crime B." (West, J. in *Reg. v. Parbhudas*, 11 Bom. H. C. 90). The sections relating to character (sections 52-55) confirm this view, since character is often of the utmost importance in weighing the probabilities of a case and yet evidence of character is only admitted under certain restrictions. The following illustration is given by Bentham:—"The circumstances are such that the crime must have been committed by one of two men; the first is a noted thief, a man of violent habits; the other, a person of refinement, wealth and benevolence. Evidence of the latter's character, rendering it almost incredible that he should have committed the crime would be admissible. Evidence of the other man's character would not be admissible."

Sir James Fitz James Stephen remarked:—"The sort of facts which the section was intended to include are facts which either exclude or imply more or less distinctly the existence of the facts sought to be proved. Some degree of latitude was designedly left in the wording of the section (in compliance with a suggestion from the Madras Government) on account of variety of matters to which it might apply. The meaning of the section would have been more fully expressed if words to the following effect had been added to

it :—"No statement shall be regarded as rendering the matter stated highly probable within the meaning of this section unless it is declared to be a relevant fact under some other section of this Act."*

7. In suits in which damages are claimed, any fact which will enable the Court to determine the amount of damages which ought to be awarded is relevant. (S. 12)

Facts tending to enable Court to determine amount of damages are relevant.

Note—In suits in which damages are claimed, the amount of the damages is a fact in issue. This section lays down generally that evidence tending to determine *i.e.*, to increase or diminish, the amount of damages which ought to be awarded to a party is relevant, (Damages are the pecuniary satisfaction which the plaintiff may obtain by success in an action. They are limited to the loss which the plaintiff has actually sustained.) Thus in a suit for breach of contract, all facts showing the amount of loss occasioned to the plaintiff by the breach, are relevant as enabling the court to determine the amount of damage to be awarded.

What facts are relevant in a suit in which damages are claimed ?
Punj. 1916,

Character affecting the amount of damages in civil actions is relevant under S. 55 *infra*.

8. Where the question is as to the existence of any right or custom, † the following facts are relevant—

Facts relevant when right or custom is in question.
What facts are relevant when any right or custom is in

(a) Any transaction by which the right or custom in question was created, claimed, modified, recognized, asserted or denied, or which was inconsistent with its existence.

* But Mr. Field says :—The terms of the section are wide enough to admit any fact which by any process of reasoning can be shown to have a bearing on any fact in issue or any relevant fact. The section can hardly be limited, as has been suggested, to those facts which are relevant under some other provision of the Act, for this would render the section meaningless.

† To satisfy the requirements of this section, the question must be as to the existence of the right or custom [31 Bom. 143].

question ?
C.U.1916(b),
All. 1919.
Panj. 1916.
{Vide also
Ss. 32 (4), 32
(7) & 48}.

(b) Particular instances in which the right or custom was claimed, recognised, or exercised or in which its exercise was disputed, asserted or departed from. (S. 13).

Illustration.—The question is whether A has a right to fishery. A deed conferring the fishery on A's ancestors, a mortgage of the fishery by A's father, a subsequent grant of the fishery by A's father, irreconcilable with the mortgage, particular instances in which A's father exercised the right, or in which the exercise of the right was stopped by A's neighbours, are relevant facts.

Note.—This section declares that any transaction by which a right or custom was created, claimed, modified, denied or asserted and particular instances in which such right or custom was claimed, recognised or exercised, are relevant and admissible in evidence.

Right.—The word "right" is used here to mean *any* right of or over property and is not restricted to *incorporeal* rights only. The word "right" is used in this section in a wide sense and is not restricted to the class of rights indicated in the illustration to the section. It comprehends any and every right known to the law. (31 Bom 143).

The right mentioned in this section is not a public right only; the illustration shows this, the right there mentioned being a private one. Three kinds of rights are thus included in the Acts—(a) private *e.g.*, a private right of way; (b) general, which is defined to include rights common to any considerable class of persons. *e.g.*, the right of villagers of a particular village to use the water of a particular well, and (c) public. The latter class of right is nowhere defined in the Act. Every public right is a general one, though (if the distinction made in English law between the terms "general" and "public" be accepted) every general right is not a public one. (W. & A.)

Custom or Usage.—A custom is a rule which in a particular district, class or family has, from long usage, obtained the force of law. It must be ancient, certain and reasonable and being in derogation of the general law, construed strictly. The word "usage" would include what the people are, now or recently, in the habit of doing in particular place. It may be that this particular habit is only of a very recent origin, or it may be one which has existed for a very long time. If it be one which is regularly and ordinarily practised, there is usage. The words "custom" and "usage" in this and other sections of the Act have been used in their widest sense, including all customs, ancient or otherwise, and all usages. Three classes of custom or usage are dealt with in this Act: (a) private, (b) general and (c) public. Instances of the first class are family customs and usages termed *kulachar*. The expression "general custom" is defined to include customs common to any considerable class of persons. These are (a) local, termed *desachar* (b) caste or class or (c) trade-customs or usages. Public custom is nowhere defined in the Act. In English law the term "public" is strictly applied to that which concerns *every member* of the State; and the term "general" is confined to a lesser, though still a considerable, portion of the community.

Transactions.—A "transaction" has been defined by Webster as 'the doing or performing of any business; management of any affair; performance; that which is done; an affair as the transactions on the exchange. A transaction is something already done and completed.' A transaction, as the derivation denotes, is something which has been concluded between persons by a cross or reciprocal action as it were. (Per Jackson, J. in 6 Cal. 185). In the ordinary sense, the word means some business or dealing which is carried on or transacted between two or more persons. (Per Garth, C. J., in 6 Cal. p. 186). "Transaction

in its largest sense means that which is done." (Per Mitter, J., in 6 Cal. p. 175).

Instance.—An "instance" has been defined as "that which offers itself or is offered as an illustrative case ; something cited in proof or exemplification ; a case occurring ; an example." (Webster).

Admissibility of judgments and decrees not interpartes under this section.—Judgments *qua* judgments or adjudications upon questions in issue and proofs of the particular points they decide, are only admissible either as (a) *resjudicata*, (b) as being '*in rem*' or (c) as relating to matters of a public nature (See Ss. 40-42 *infra*). In (a) they are between the same parties ; in (b) they are declared by law to be conclusive proof against all persons of certain matters only, in (c) though not conclusive they are relevant as adjudications against persons not parties to them, the reason being that in matters of public right the new party to the second proceeding as one of the public has been virtually a party to the former proceeding. But judgments, orders and decrees, other than those admissible by Ss. 40, 41, 42 are irrelevant unless their existence is a fact in issue or they are relevant under some other provision of the Act. (See Sec. 43 *infra*). This being so, the question arises whether, and if so how, previous judgments and decrees and the litigation in which they were pronounced not being between the same parties, are admissible in evidence in proof of "right" and "custom" (not being of a public nature) under this section. This question gave rise to many conflicting decisions. In *Gujjula v. Fattehlah* (6 Cal. 171)* it was held by the majority of the Full Bench (Mitter J., dissenting) that the former judgment was not admissible as evidence in the subsequent suit, either as a "transaction" under S. 13, or as a "fact" under S. 11 or under any other section of the Evidence

State the view of Justice Mitter in the cases of *Gujjula v. Fattehlah* (6 Cal. 171). State the reasons given by the learned Judge in support of his view. C.U. 1926(b). [See Selection of Leading Cases published by the Cal. University.] Discuss whether judgment not *inter-partes* is admissible against a third party. C.U. 1927(b). 1927 (a).

* The facts of the case were as follows :—In 1876, Gujjula, brought a suit against one Janki Sing and another in which the question was whether

Act and that a former judgment which is not a judgment *in rem* under S. 41, nor one relating to matters of a public nature under S. 42, is not admissible in evidence in a subsequent suit, either as a *res judicata* or as proof of the particular point which it decides, unless between the same parties or those claiming under them. Mitter J., on the contrary, held that a judgment though not *inter partes* may be received in evidence either under section 11 or 13 of the Evidence Act. This view of Mitter J. has subsequently been approved in several decisions of the various High Courts and in the decisions of the Privy Council in *Ram Ranjan Ram Narain* (22 Cal. 533), *Bhitto Kunwar v. Kesho Pershad* (19 All. 277) and *Dinomoni v. Brojomoni* (6 C. W. N. 35) where it has been held that under certain circumstances, and in certain cases, the judgment in a previous suit to which one of the parties in the subsequent suit was not a party may be admissible in evidence, for certain purposes, and with certain objects, in the subsequent suit. Judgments not *inter partes* are admissible only to prove that on a previous occasion there was a dispute about the subject matter, that is, there was an assertion by the plaintiff and the denial by the defendant, of the right; but that neither the issue in the judgment can be looked to *nor* the findings of the Judge can be treated as of any legal probative value in the subsequent suit. (31 Bom. 143). In the recent cases in 12 C. W. N. 739 and 34 Cal. 868 (p. 872) it has been held that the decision in

Gujjural or one Shambeharial was the nearest heir of one Bichukial. It was decided in that suit that Shambeharial and not Gujjural was the nearest heir. (Fattehlah was no party to that suit) Subsequently, Fattehlah sued Gujjural to recover possession of certain property. Fattehlah's title depended upon establishing that Shambeharial and not Gujjural was the nearest heir of Bichukial and he offered in evidence the judgment in the previous suit between Gujjural and Janki Sing and another. It was contended that Fattehlah not having been a party to the previous suit, the judgment was not admissible in the subsequent suit. The Lower Courts admitted the judgment in evidence and on the basis thereof decreed the suit. Gujjural appealed to the High Court. The question before the High Court was whether the previous judgment which was not *inter partes* was admissible in the later suit.

State the facts and discuss the law as enunciated in *Gujjural v. Fattehlah* : (6 Cal. 171). C.U. 1925(b).

Judgments in previous cases although not *inter partes* are admissible in evidence under S. 13 of the Evidence Act. Purpose for which such judgments may be used.

Discuss the case of *Gujjural v. Fattehlah* (6 Cal. 171) with special reference to the rule of evidence applicable to the facts of the case. C.U. 1919(b); Mad. 1916.

Discuss the
law enun-
ciated in
Gujjural v.
Fattehlal
6 Cal. 171.
C.U. '25 (a).

a previous suit would be admissible to this extent, namely to show that on that occasion the title which is subsequently asserted, was alleged. In 7 C. L. J. 563 (p. 576) it has been held that a decree not *interpartes* is admissible in evidence as an instance of a litigation in which the right now in controversy was successfully asserted. In *Lakshman v. Amrita* (24 Bom. 591) Ranade J., said :—"Apparently the cases, which decide that judgments, not *interpartes*, are not admissible in evidence, proceed chiefly on the ground that these judgments are sought to be used as having the effect, more or less, of *res judicata*. For that purpose a judgment *interpartes* alone can be admitted in evidence, but for other purposes where judgments are sought to be used to show the conduct of the parties or to show particular instances of the exercise of a right or admission made by ancestors, or how the property was dealt with previously, they may be used under S. 11 or 13 as exceptions recognised under S. 43 as relevant evidence. Except where they are judgments *in rem*, or where they relate to public matters, judgments not *interpartes* have been always held to be not *res judicata* but they cannot be wholly excluded for other purposes in so far as they explain the nature of possession, or throw light on the motives or conduct of parties or identify property."

Field in his Law of Evidence observes : "Judgments are not *prima facie* admissible but when the fact of litigation is relevant, the plaint should be admitted as an assertion of the right and the written statement as a denial of it and with them the judgment to show how far litigation and the consequent assertion or denial of the right went. The judgment is not evidence of the judicial decision expressed therein, but the fact whether the assertion was successful in a number of cases can hardly fail to have some bearing on the decision of the Court even though the Judge is legally bound to disregard such judicial opinion."

'It is well settled that although a judgment not *inter-*

partes may be used in evidence in certain circumstances as a fact in issue or as a relevant fact or possibly as a transaction, the recitals in the judgment cannot be used as evidence in a litigation between the parties. The principle is that all judgments are conclusive of their existence, as distinguished from the truth. Judgments as public transaction of a solemn nature, are presumed to be faithfully recorded. Every judgment is therefore conclusive evidence, for or against all persons whether parties, privies or strangers, of its own existence, date and legal effect, as distinguished from the accuracy of the decision recorded; in other words, the law attributes unerring verity to the substantive as opposed to the judicial portion of the record. (*Per* Mukherjee J. in *Kashinath v. Jagat Kishore*, 20 C. W. N. 643 at p. 646.)

6. Facts showing the existence of any state of mind, such as intention, knowledge, good faith, negligence, rashness, ill-will or good-will towards any particular person, or showing the existence of any state of body or bodily feeling, are relevant, when the existence of any state of mind or body or bodily feeling is in issue or relevant. ✓

Facts showing existence of mind or of body or bodily feeling

Explanations (1).—A fact relevant as showing the existence of a relevant state of mind must show that the state of mind exists, not generally but in reference to the particular matter in question.

(2).—But, where, upon the trial of a person accused of an offence, the previous commission by the accused of an offence is relevant within the meaning of this section, the previous conviction of such person, shall also be a relevant fact. (S. 14).

Illustrations*:—(a) A is accused of receiving stolen goods

*. Ills. (a), (i), (j), (o), and (k) refer to 'intention'; Ills. (a), (b), (c) and (d) to 'knowledge'; (f), (f) and (h) to 'good faith'; Ill. (k) to 'ill-will'; Ill. (n) to 'negligence'; Ills. (p) and (m) to 'states of body'; and Ills. (n), (o) and (p) to Explanation I.

knowing them to be stolen. It is proved that he was in possession of a particular stolen article. The fact that, at the same time, he was in possession of many other stolen articles is relevant, as tending to show that he knew each and all of the articles of which he was in possession to be stolen.

(b) A is accused of fraudulently delivering to another person a piece of counterfeit coin which, at the time when he delivered it, he knew to be counterfeit. The fact that, at the time of its delivery, A was possessed of a number of other pieces of counterfeit coin, is relevant. The fact that A had been previously convicted of delivering to another person, as genuine, a counterfeit coin knowing it to be counterfeit is relevant.

(c) A sues B for damage done by a dog of B's, which B knew to be ferocious. The facts that the dog had previously bitten X, Y and Z, and that they had made complaints to B are relevant.

(d) The question is, whether A, the acceptor of a bill of exchange knew that the name of the payee was fictitious. The fact that A had accepted other bills drawn in the same manner before they could have been transmitted to him by the payee if the payee had been a real person, is relevant as showing that A knew that the payee was a fictitious person.

(e) A is accused of defaming B by publishing an imputation intended to harm the reputation of B. The fact of previous publication by A respecting B, showing ill-will on the part of A towards B, is relevant, as proving A's intention to harm B's reputation by the particular publication in question. The facts that there was no previous quarrel between A and B, and that A repeated the matter complained of, as he heard it, are relevant, as showing that A did not intend to harm the reputation of B.

RELEVANCY OF FACTS.

(f) A is sued by B for fraudulently representing to B that C was solvent, whereby B, being induced to trust C, who was insolvent, suffered loss. The fact that, at the time when A represented C to be solvent, C was supposed to be solvent by his neighbours and by persons dealing with him, is relevant, as showing that A made the representation in good faith.

(g) A is sued by B for the price of work done by B upon a house of which A is the owner, by the order of C, a contractor. A's defence is that B's contract was with C. The fact that A paid C for the work in question is relevant, as proving that A did, in good faith, make over to C the management of the work in question, so that C was in a position to contract with B on C's own account and not as agent for A.

(h) A is accused of the dishonest misappropriation of property which he has found, and the question is whether, when he appropriated it, he believed in good faith that the real owner could not be found. The fact that public notices of the loss of the property had been given in the place where A was, is relevant, as showing that A did not in good faith believe that the real owner of the property could not be found. The fact that A knew, or had reason to believe, that the notice was given fraudulently by C, who had heard of the loss of the property and wished to set up a false claim of it, is relevant, as showing that the fact that A knew of the notice did not disprove A's good faith.

(i) A is charged with shooting at B with intent to kill him. In order to show A's intent, the fact of A's having previously shot at B may be proved.

(j) A is charged with sending threatening letters to B. Threatening letters previously sent by A to B, may be proved as showing the intention of the letters.

(k) The question is, whether A has been guilty of cruelty towards B, his wife. Expressions of their feeling

towards each other shortly before or after the alleged cruelty, are relevant facts.

(l) The question is whether A's death was caused by poison. Statements made by A during his illness as to his symptoms, are relevant facts.

C.U. 1921(b) (m) The question is, what was the state of A's health at the time when an assurance on his life was effected. Statements made by A as to the state of his health at or near the time in question, are relevant facts.

Bom. 1917(b). (n) A sues B for negligence in providing him with a carriage for hire not reasonably fit for use, whereby A was injured. The fact that B's attention was drawn on other occasions to the defect of that particular carriage, is relevant. The fact that B was habitually negligent about the carriages which he let to hire, is relevant.

Bom. 1917(a). (o) A is tried for the murder of B by intentionally shooting him dead. The fact that A, on other occasions, shot at B, is relevant as showing his intention to shoot B. The

C.U. 1924(a). fact that A was in the habit of shooting at people with intent to murder them, is irrelevant.

Punj. 1915. (p) A is tried for a crime. The fact that he said something indicating an intention to commit that particular crime, is relevant. The fact that he said something indicating a general disposition to commit crimes of that class is irrelevant.

"Evidence must be directed and confined to the matter in issue ; but evidence as to matter not in issue may be given in order to

Note.—It is a general rule that whenever the state of mind in which a person did a thing is material then anything which such person said or did, in another transaction is admissible if it leads upto, or throws light on, the state of mind, at the time of the transaction. When the question is as to whether a person did or said something, the fact that he did or said something else on another occasion is relevant, if it shows the existence, on that occasion of any state of mind such as intention, knowledge, good faith, negligence,

rashness, ill-will or good-will, the existence of which is in issue ; but it must be shown that the state of mind exists in reference to the particular question and not generally. Take the case of libel or slander ; the plaintiff has to prove malice, and to do this he can give evidence of words and acts of the defendant, either previous or subsequent, to the publication, which would throw light upon the defendant's mind at the time of the publication. (Kinney).

Scope of the section .—This section applies to that class of cases where a particular act is more or less criminal or culpable according to the state of mind or feeling of the person who does it, as for instance, in actions of slander or false imprisonment or malicious prosecution where malice is one of the main ingredients in the wrong which is charged, evidence is admissible to show that the defendant was actuated by spite or enmity against the plaintiff, or again, on a charge of uttering counterfeit coin, evidence is admissible to show that the prisoner knew the coin to be counterfeit because he had passed similar coins in his possession or had passed such coin before or after the particular occasion which formed the subject of the charge. The illustrations show with sufficient clearness the sorts of cases to which this section is applicable. Care should, however, be taken not to extend the operation of this section to other cases where the question of guilt or innocence depends upon actual facts, and not upon the state of a man's mind or feeling. Thus, it cannot be proved that a man committed theft or any other crime on one occasion, by showing that he committed similar crimes on other occasions. .

Explanation 1.—Illustrations (n), (o) and (p) explain the purport of this Explanation. The state of mind to be proved must be, not merely a *general* tendency or disposition towards conduct of a similar description to that in question, but a condition of thought and feeling having distinct and immediate reference to the matter under enquiry. The fact

prove intent." Explain and illustrate, C. U. '14 (b); Give reasons for the foll. rule and state any exception to it that you know :— "Evidence of the accused having committed crimes other than that with which he is charged is not admitted." Bom. 1918(a); In an action for goods sold and delivered, to which the defence was that the sale was subject to a certain condition, is it competent to the deft. to call witnesses to prove that the plff. had made contracts with other persons subject to that condition ? C. U. '21 (a). [Ans : No . The fact of a person having once or many times in his life done a particular act in a particular way.

does not make it more probable that he has done the same thing in the same way upon another and different occasions. See *Hollingham v. Head* (4 C. B. N. S. 388)].

Are the following facts relevant :—

(a) when the question was whether A, a brewer sold good beer to B, the fact that A sold good beer to C, D & E, other publicans ?

[No : See *Holcombe v. Hewson*, 1810, 2 Comp. 391 : Where it was necessary for a brewer to prove that he had supplied a publican with good beer, other publicans were not allowed to show that, during the same period, as the dealing in question, he had furnished them

that a man is generally dishonest, generally malicious, generally negligent or criminal in his proceedings, does not bear, with sufficient directness, on his conduct on any particular occasion, or as to any particular matter to make it safe to take it as a guide in interpreting his conduct ; what is wanted is a fact which will throw light on his motives and state of mind with immediate reference to that particular occasion or matter. Illustrations (a) and (b) make this clear. A man is accused of receiving stolen goods with guilty knowledge ; if he is merely shown to be *generally* dishonest, the probability of his having been dishonest in this particular transaction is perhaps increased, but only in a vague and indefinite way ; but, if at the time, he is found in possession of a number of other stolen articles, this fact throws a distinct light on his knowledge and intentions as to the articles of which he is found in possession. It would be dangerous to infer that because a man was generally dishonest, he was dishonest in any single case ; but it is not dangerous to infer that a man, who is found in possession of 50 articles, which are shown to have been stolen from different people, came by each and all in a dishonest manner (Cunningham). Explanation (1) and ill. (o) render facts showing the existence of a state of mind relevant only if they establish that such a state of mind existed in reference to the particular matter in issue. (36 Cal. 573).

An accused cannot be convicted of the offence charged against him simply because he has been guilty of another offence. When such evidence is offered to prove his commission of the offence on trial, evidence of his participation either in act or design, in commission or preparation in an independent crime cannot be received. Proof cannot be offered of such independent offence to show that by reason of such independent offence the accused is more likely to have committed the one for which he is on trial ; evidence of

such collateral offence cannot be received as substantive evidence of the offence on trial. (18 C. L. J. 578).

Facts similar to, but not part of the same transaction as the main facts, are not in general, admissible to prove either the occurrence of the main fact or the identity of its author. But evidence of similar facts or the connection of the parties therewith, is receivable, after evidence *aliunde* on these points had been given to show the state of mind of the parties with regard to such fact ; in other words, evidence of similar facts may be received to prove a party's knowledge of the nature of the main fact or transaction or his intent with respect thereto. In general, whenever it is necessary to rebut, even by anticipation, the defence of accident, mistake or other innocent condition of mind, evidence that the accused had been concerned in a systematic use of conduct of the same specific kind as that in question may be given. To admit evidence under this head however, the other acts tendered must be of the same specific kind as that in question and not of a different character and the acts tendered must also have been proximate in point of time to that in question. A man's 'guilt is to be established by proof of the facts and not by proof of his character. Such evidence must create a prejudice but not lead a step towards substantiation of guilt. Evidence should not be taken to prove the dishonourable purpose for which a false name was assumed by an accused person, if the purpose is in no way connected with the conspiracy charged against him. (42 Cal. 957).

with beer of an excellent quality, for a man may deal well with some of his customers though not with others.]
(b) When the question was whether one person acted as agent for another on a particular occasion the fact that he so acted on other occasions ?
[Yes : Similar facts may be admissible in proof of agency.
(Stephen's Digest, Act. 13.)]
All, 1915.

On a charge against two persons of murder and of a conspiracy to rob the victim and for abatement of the offences the prosecution wanted to adduce evidence of association of the two accused in connection with other charges of theft in the town and generally of a series of incidents from 1914 to 1918 that they used to go about together under different

names, the one taking the other as his *durwan* and introducing himself as a rich landlord to several rich woman who subsequently lost ornaments and cash which were gradually recovered. The accused objected to the admissibility of the evidence. *Held* that the evidence was not admissible under Sec. 9, 11, 14 or 15 of the Evidence Act. Sec. 15 of the Evidence was not applicable in as much there was no question of the acts being accidental or intentional or done with a particular knowledge or intent. The gist of S. 15, is that unless there is a sufficient and reasonable connection between the fact to be proved and the evidentiary fact, that is, unless there is in substance some common link, they cannot form a *series* and as each of the subsequent occurrences of which evidence was given, had its own special feature, they were not *similar* occurrences. Sec. 14 also was not applicable, as the evidence of the subsequent occurrences did not show the state of mind of the accused towards the murdered woman. Similarly Secs. 9 and 11 also did not apply, for the question of identity under sec. 9 does not arise till the offender committing the crime charged is ascertained by independent evidence and evidence of the subsequent incidents were not admissible under Sec. 11. (*Emperor v. Panchu Das*, 47 Cal. 671 ; 31 C. L. J. 402).

Explanation 2.—This Explanation is to be read with illustrations (e) and (f) to Sec. 43 and with Sec. 54 *infra*. The Explanation distinctly states that where the previous commission of an offence is relevant, the previous conviction of such person should also be a relevant fact. A is accused of fraudulently delivering to another person a counterfeit coin which, at the time when he delivered it, he knew to be counterfeit. The fact that A had been *previously convicted* of delivering to another person as genuine a counterfeit coin knowing it to be counterfeit is relevant in as much as the previous commission of the crime by A is relevant as showing the existence of guilty knowledge or intent. The

previous conviction will not, however, be relevant unless the commission of the offence for which the conviction is to be had, is relevant within the meaning of the first para of this Section.

Res inter alios actos.—The acts and statements of a party in other transactions or upon other occasions are, as a rule, inadmissible in evidence as they generally afford no ground for any inference respecting the matter in issue. There is usually no reason to infer that, because a person acted in a certain manner on a certain occasion, he acted in the same manner on another occasion. "Inferences are not to be drawn from one transaction to another which is not specifically connected with it, merely because the two resemble each other; as a matter of fact they must be linked together by the chain of cause and effect in some assignable way before an inference can be drawn." But to this rule there are some exceptions which are embodied in Secs. 14, 15 and 40-42 of the Evidence Act. The principle on which evidence of similar acts is admissible is not to show that, because defendant has committed one crime, he would, therefore, be likely to commit another, but to establish the *animus* of the act, and rebut by anticipation, the defences of ignorance, accident, mistake or some innocent motive or intention. Ss. 14 and 15 deal with evidence as to the state of mind or body of the defendant. State of mind, knowledge, intention and the like are among the most important topics with which judicial enquiries are concerned. In criminal cases they are invariably a main consideration, and in civil cases, they are often highly material, as for instance, where there is a question of fraud, malicious intention or negligence.

A licence-clerk received Rs. 2. for each renewal of licences for hand-carts instead of Re. 1-14. He is charged with cheating and evidence is produced showing that he had also taken 2 annas in excess from persons other than those named in the charge. An objection has been taken on behalf of the relevancy of this evidence. How will you decide the point. Give reasons. Bom. 1916(a).

[Ans : The evidence in question is inadmissible under S. 14 or 15. (34 Cal. 573.)]

10. When there is a question whether an act was accidental, or intentional, or done with a particular knowledge or intention, the act that such act formed part of a series of similar occurrences in

Facts showing whether act done was accidental or intentional.

each of which the person doing the act was concerned, is relevant. (S. 15).

Illustrations :—(a) A is accused of burning down his house in order to obtain money for which it is insured. The facts that A lived in several houses successively, each of which he insured, in each of which a fire occurred, and after each of which fires A received payment from a different insurance office, are relevant, as tending to show that the fires were not accidental.

(b) A is employed to receive money from the debtors of B. It is A's duty to make entries in a book showing the amounts received by him. He makes an entry showing that on a particular occasion he received less than he really did receive. The question is whether this false entry was accidental or intentional. The facts that other entries made by A in the same book are false, and that the false entry is in each case in favour of A, are relevant.

(c) A is accused of fraudulently delivering to B a counterfeit rupee. The question is, whether the delivery of the rupee was accidental. The facts that, soon before or soon after the delivery to B, A delivered counterfeit rupees to C, D and E are relevant, as showing that the delivery to B was not accidental.

Note.—This section is merely an application of the general rule laid down in Sec. 14. The facts contemplated by it are facts showing system. In each of the cases by which it is illustrated the evidence admitted went to prove the true characters of facts which, standing alone, might naturally have been accounted for on the supposition of *accident*, a supposition which is rebutted by the repetition of similar occurrences. The words of the section as well as of illustration (a) show that it is not necessary that all the acts should form parts of one transaction, but if they form parts of a series of similar occurrences, such acts may be proved.

11. When there is a question whether a particular act was done, the existence of any course of business, according to which it naturally would have been done, is a relevant fact. (S. 16) ✓

Facts showing existence of course of business.

Illustrations.—(a) The question is, whether a particular letter was despatched. The facts, that it was the ordinary course of business, for all letters put in a certain place to be carried to the post, and that particular letter was put in that place, are relevant.

(b) The question is whether a particular letter reached A. The facts that it was posted in due course, and was not returned through the Dead Letter Office, are relevant.

Note.—This section proceeds upon the well-recognised fact that the conduct of human beings is generally, and in official and commercial matters, to a very great extent indeed, uniform. The book of a well-ordered firm, for instance, is kept from year to year in so unvarying a manner, that there is the strongest presumption that the regularity will not in any particular instance be departed from. But the existence of the course of business must be clearly made out. This section is similar to ill (f) of sec. 114 *infra*.

II. Statements when relevant facts.—The second class of relevant facts are certain statements. (Ss. 17-38). As a general rule the mere fact that some one has previously said something about the fact to be proved is not a relevant fact, but there are certain conditions under which previous statements have a most important bearing on the probabilities of the case, and are almost the best evidence that a Court can have. Everything depends on the person by whom and the circumstances in which the statements are made. The following classes of statements have been declared to be relevant facts under the Act :—

Give some exceptions in the Evidence Act to the rule excluding hearsay. C. U. 15(b). When is hearsay evidence admissible and why? C.U. 1914(b). When is hearsay evidence accepted as good evidence in a court of law? Illustrate some of these cases.

1. Admission and Confessions. (Ss. 17-31.)
2. Statements by persons who cannot be called as witnesses. (Ss. 32-33.)

What is the principle underlying such exceptions? C.U. 1925(a).

Define "admission" and distinguish it from "confession." Bom. 1914(a), 1914 (b), 1910 (b), 1907 (h).

3. Statements made under special circumstances. (Ss. 34-39.)

I. Admissions and Confessions.

Sections 17-31 deal with the subject of admissions and confessions which are generally said to form exceptions to the general rule which excludes hearsay.* "The general rule is, that every material fact must be proved by testimony on oath. There is an exception to this rule, namely, that the declaration of a party to the records or of one identified in interest with him, are as *against such party*, admissible in evidence" (*Per Bayley, J. in Spargo v. Brown*, 9 B. & C. 955, 938). The statements which are the subject-matter of these sections are admitted because in respect of persons making them there is some security for their accuracy which countervails the general objections to hearsay testimony. As universal experience testifies that as men consult their own interest and seek their own advantage, whatever they say or admit against their interest or advantage may, with tolerable security, be taken to be true as *against them* at least until the contrary appears (W. & A.)

Sections 17-23 and 31 deal with the subject of admissions. The rules of evidence applicable to confessions are dealt with in sections 24-30

*Admissions are sometimes used as merely discrediting a party's statement by showing that he has on other occasions made statements inconsistent with the case afterwards set up. Their effect in such a case is merely destructive. It is their inconsistency with the party's present claim that gives them logical force and not their testimonial credit. For in such cases the truth of the admission is not relied on, and therefore they are not obnoxious to the hearsay rule. But an admission may also state facts against interest as where it admits a claim or a fact relied on by the adversary. In such cases the admission is used as evidence of the truth of its contents and as possessing an evidentiary force *per se*. It is then equivalent to affirmative testimony for the party offering it. Admissions in such cases have a testimonial value independent of the contradiction and being the statements of persons not witnesses form exceptions to the hearsay rule. (Woodroffe & Ameer Ali.)

Distinction between Admission and Confession.—

The English law of evidence makes a distinction between *admission* and *confession*. The term "admission" is usually applied to *civil* transactions, and to those matters of fact in criminal cases which do not involve *acknowledgment of guilt*, or statements which suggest the inference of criminal intent, the term "confession" being generally restricted to *admission of guilt*. This distinction is not maintained in the Evidence Act and Sections 17-22 are applicable to *civil* as well as to *criminal* cases. Sections 17-31 of this Act deal with "admission" generally and include sections 24-30 which treat of "confession" as distinguished from "admission." It would, therefore, appear that a confession is a *species* of which the admission is the *genus*; in other words, *all admissions are not confessions, but all confessions are admissions*. When a confession falls short of actual admission of a guilt and is not taken down according to law it may nevertheless be used against the maker of it as an admission under S. 21 of the Evidence Act. (15 Cal. 595.).

A—ADMISSIONS (Ss. 17-23 & 31.)

1. Definition of admission.—An admission is a statement, oral or documentary which suggests any inference as to any fact in issue or relevant fact and which is made by any of the persons and under the circumstances, mentioned below. (S. 17).

2. What are admissions? (a) Statements made by a party to the proceeding or by an agent to any such party, whom the Court, regards under the circumstances of the case, as expressly or impliedly authorised by him to make them, are admissions.

(b) Statements made by parties to suits suing or sued in a representative character, are not

What are "admissions?" Bom. 1917(b). Who can make them and when can they be used by and on behalf of those who make them? Bom. 1909(b). Defined "admission" and state under what circumstances an admission made by a

partner may be received in evidence against another partner ?

All. 1915.

In what cases can an admission be proved on behalf of the person making it ?

All. 1916.

What is an admission ?

Under what circumstances can an admission be used in a suit ?

All. 1917.

What is the distinction between an admission and an estoppel and in what cases can the former be proved by or on behalf of a person who makes them or by his representative in interest ?

Punj. 1915.

admissions, unless they were made while the party making them held that character.

(c) Statements made by—

(1) persons who have any proprietary or pecuniary interest in the subject matter of the proceeding and who make the statements in their character of persons so interested or

(2) persons from whom the parties to the suit have derived their interest in the subject-matter of the suit,

are admissions if they are made during the continuance of the interest of the persons making the statements. (S. 18).

(d) Statements made by persons whose position or liability it is necessary to prove as against any party to the suit, are admissions, if such statements would be relevant as against such persons in relation to such position or liability in a suit brought by or against them, and if they are made whilst the person making them occupies such position or is subject to such liability * (S. 19)

Illustration—A undertakes to collect rents for B. B. sues A for not collecting rent due from C to B. A denies that rent was due from C to B. A statement by C that he owed B rent is an admission, and is relevant fact as against A, if A denied that C did owe rent to B.

* This section forms an exception to the rule that statements made by strangers to a proceeding are not admissible against the parties. The illustration exemplifies that where the liability of a person who is one of the parties to a suit depends upon the liability of a stranger to the suit, then an admission by the stranger in respect of his liability amounts to an admission on the part of that person (R & D).

(e) Statements made by persons to whom a party to the suit has expressly referred to for information in reference to a matter in dispute are admissions. • (S. 20).

What is an Admission ?
By whom and under what circumstances can admission be made ?
C.U. 1926 (b)

Illustration—The question is whether a horse sold by A to B is sound. A says to B,—‘Go and ask C ; C knows all about it’. C’s statement is an admission.

What is an admission.—Shortly speaking an admission is a statement, oral or documentary, which suggests any inference as to any fact in issue or relevant fact and which is made by or on behalf of, any party to any proceeding. An admission is a statement of fact which waives or dispenses with the production of evidence by conceding that the fact asserted by the opponent is true. An admission, therefore is not so much a *proof of fact* as a waiver of proof. Admission may be oral or contained in documents, *e.g.*, letters, depositions, affidavits, complaints, written statements, deeds, receipts etc. Beside admissions, *written* and *oral*, a party may make admissions by his *conduct*. These are not mentioned here, as they already have been dealt with in S. 8 *ante*. Admission by assumed character, conduct, silence, and the like are apparently not admissions in the sense of an exception to the hearsay rule ; they are usually original circumstantial evidence of the facts to which they relate (W & A).

Who may make admissions ?—Sections 18-20 indicate the persons by whom a statement, such as is referred to in sec. 17, must be made in order that it may rank as an admission. The following seven classes of persons can make admissions :—

* This section forms another exception to the rule that admissions by strangers to a suit are not relevant. Under it, the admissions of a third person are receivable in evidence against the party who has *expressly* referred another to him for information in regard to an uncertain or disputed matter (The reference herein mentioned must be an *express* reference for information in order to make a statement of the person referred to admissible.)

- (1) Party to the proceeding.
- (2) Authorised agent of such party.
- (3) Party suing or sued in representative character
(*while holding such character*).
- (4) Person who has any proprietary or pecuniary interest in the subject-matter of the proceeding
(*during the continuance of such interest*).
- (5) Person from whom the parties to the suit have derived their interest in the subject-matter of the suit (*during the continuance of such interest*).
- (6) Person whose position or liability must be proved against any party to the suit,
- (7) Person to whom a party to the suit has expressly referred to for information in reference to the matter in dispute.

(1) **Party to a proceeding**—Party to a proceeding includes persons suing or sued personally (Cl. 1, sec. 18) or in representative character (cl. 2, sec. 18) such as executors, administrators, trustees, guardians and next friends &c. A statement made by a party to a proceeding may be an admission whenever it is made, unless it is made by a person suing or sued in a representative character only, in which case it must be made whilst the person making it sustains that character. (Cl. 2, sec. 18).

(2) **Agent**—The word “agent” has not been defined in this Act. Sec. 123 of the Indian Contract Act says : “An agent is a person employed to do any act for another or to represent another in dealings with third parties.”

Explain the term “Admission” as used in the I. E. Act. Is an admission by an agent evidence for or against his principal in a criminal case ?

A statement made by an agent whom the Court regards under the circumstances of the case, as expressly or impliedly authorised to make it, is admissible, even though not on oath. What is said or done by an agent, within scope of his authority, having relation to, or connection with, and in the course of, the particular business in which he is em-

ployed is regarded as said or done by the principal, through him as his mere instrument. The rule admitting declaration of an agent being found upon his legal identity with the principal such declarations only bind the principal so far as the agent had legal authority to make them. (Taylor). Before the statements of an agent can be relevant as admission, the fact of agency must be proved.

(3) **Party suing or sued in a representative character.**—*e. g.*, trustees, executors, administrators, guardians, the assignee of a bankrupt etc. It is important to note that such persons must make admission while holding that character. Their statements will not affect the interests of persons, whom they represent, unless they are made after the creation and during the continuance of such representative character.

(4) **Persons who has any proprietary or pecuniary interest.**—This includes persons who are jointly interested in the subject-matter of the suit and who make admission in regard thereto, and admissions made by any one of such persons may be proved against others. This would be the case as between partners, joint-debtors or creditors, joint-proprietors and joint-tenants. It is only on the supposition that their interests are identical that there can be any justice in holding that the statement of one should be used against the other. It is important to note that such persons must make the statement in their character of persons so interested.

(5) **Persons from whom the parties to the suit have derived their interest.**—Admissions of persons from whom the parties to the suit have derived their interests in the subject-matter of the suit are relevant on the ground of privity between them. Privies are of three kinds: (a) *Privies in blood*, as heirs and ancestors and co-parceners. (b) *Privies in law*, as executors and testators, administrators and persons dying intestate. (c)

Privies in estate or interest, as vendor and purchaser, lessor and lessee, mortgagor and mortgagee, donor and donee etc. The grounds upon which admissions are evidence against those in privity with the party are that they are identified in interest.

To render the admissions of persons from whom the parties to the suits have derived their title, it must be shown that *the admissions were made when they had interest in the subject matter of the suit* and not after their interests have ceased; "because, it is manifestly unjust that a person who has parted with the interest in property, should be empowered to divest the right of another claiming under him, by any statement that he may choose to make," (Taylor).

(6) & (7): **Admission by strangers**—The general rule is that the statements of strangers to a proceeding are not relevant as against the parties. Sections 19 and 20 are exceptions to this general rule and show when and under what circumstances, admissions of strangers are admissible in evidence

How is an admission proved?
C.U. 1926(b).

Proof of admissions—Admissions may be proved by any witness who heard them without calling the party by whom they are made. They are in the nature of original evidence and not hearsay. (5 Mad. 239; Taylor S. 793) See notes under S. 60 *infra*.

When can admission be proved by or on behalf of the person making it?
C.U. 1915(b), Bom. 1914(a), 1917 (b).
How does an admission operate as

3. **Proof of admissions**—Admissions are relevant and may be proved as against the person who makes them, or his representative in interest, but they cannot be proved by or on behalf of the person who makes them or by his representative in interest, except in the following cases:—

(1) An admission may be proved by or on behalf of the person making it, when it is of such a nature that, if the person making it were dead,

it would be relevant as between third persons under sec. 32.

(2) An admission may be proved by or on behalf of the person making it, when it consists of a statement of the existence of any state of mind or body, relevant or in issue, made at or about the time when such state of mind or body existed, and is accompanied by conduct rendering its falsehood improbable.

(3) An admission may be proved by or on behalf of the person making it, if it is relevant otherwise than as an admission (S. 21).

Illustrations.—(a) The question between A and B is whether a certain deed is or is not forged. A affirms that it is genuine, B, that it is forged. A may prove a statement by B that the deed is genuine, and B may prove a statement by A that the deed is forged; but A can not prove a statement by himself that the deed is genuine, nor can B prove a statement by himself that the deed is forged.

(b) A, the captain of a ship, is tried for casting her away. Evidence is given to show that the ship was taken out of her proper course. A produces a book kept by him in the ordinary course of his business, showing observations alleged to have been taken by him from day to day, and indicating that the ship was not taken out of her proper course. A may prove these statements, because they would be admissible between third parties, if he were dead, under section 32, clause (2).

(c) A is accused of a crime committed by him at Calcutta. He produces a letter written by himself and dated at Lahore on that day, and bearing the Lahore post-mark of that day. The statement in the date of the letter is admissible, because if A were dead, it would be admissible, under section 32, clause (2).

(d) A is accused of receiving stolen goods knowing

against the party making it and why?
C.U. 1910(b):
"Admission cannot be proved by or on behalf of the person who makes them."
Comment.
Bom. 1916(a).
A is accused of a crime committed by him at Bombay. He produces a letter written by himself and dated at Madras on that day and bearing the Madras post mark of that day. Is the statement in the date of letter admissible in evidence?
[See ill (c)].
Give reasons for your answer and refer to the provisions of the I. E. Act, applicable to the case.
C.U. 1919(a).

them to be stolen. He offers to prove that he refused to sell them below their value. A may prove these statements, though they are admissions because they are explanatory of conduct influenced by facts in issue.

(c) A is accused of fraudulently having in his possession counterfeit coin which he knew to be counterfeit. He offers to prove that he asked a skilful person to examine the coin, as he doubted whether it was counterfeit or not, and that that person examined it and told him it was genuine. A may prove these facts for the reasons stated in the last preceding illustration.

Note.—This section lays down, as a general rule, that admissions are relevant and may be proved *against* the person who makes them or his representative in interest.* Illustration (a) exemplifies this rule. Admissions cannot be proved *by* or *on behalf of*, the person who makes them, because a person will naturally make statements that are favourable to him; but in the following three exceptional cases, an admission can be proved *by* or *on behalf of* the person making it :—

(1) When it is of such a nature that if the person making it was dead, it would be relevant as between third persons, under S. 32.

[Illustrations (b) and (c) which relate to this exception, clearly explain its meaning and give instances in which statements relevant under S. 32, may be admitted in favour of the maker or his representatives. This clause is to be read with S. 32 (1).]

(2) When it consists of a statement of the existence of any state of mind or body made *at or about the time when such state of mind or body existed* and is accompanied by conduct rendering its falsehood improbable.

* The rule laid down in this section is subject to the special provisions relating to confession and statements of accused persons enacted in Secs. 24-26 of this Act and Secs. 164 and 364, Cr. P. C. (3 C. W. N. 702).

[No illustration of this clause has been given in the Act ; probably because it has already been sufficiently treated of in sec. 14 and in illustrations (k), (l) and (m) thereto. Sec. 14 merely declares that such facts are relevant. The present clause shows that such facts or statements may be proved on behalf of the person making them notwithstanding the general rule that persons cannot make evidence for themselves by what they choose to say. (Norton). But such statements should have been made at or about the time when such state of mind or body existed.]

(3) When it is relevant otherwise than as an admission.

[This exception lays down that facts which are relevant under secs. 6-16 will not be rendered inadmissible because they may be proved on behalf of the person making them. Ills. (d) and (e) explain this clause.]

4. **Oral admission as to contents of document**—Oral admissions as to the contents of a document are not relevant, unless and until the party proposing to prove them shows, that he is entitled to give secondary evidence of the contents of such document under the rules hereinafter contained, or unless the genuineness of a document produced is in question. (S. 22.)

When are oral admissions as to documents relevant ?
C.U. 1920(a).
When may secondary evidence of the contents of a document be given ?
All, 1915.

Note.—Oral admissions as to the contents of a document are not admissible unless and until the party proposing to prove them shows that he is entitled to give secondary evidence of its contents under S. 65 of this Act or unless the genuineness of the document produced is in question. The result of this section read with S. 65 (b) is that the contents of a document may be proved by the *written* admission of the person against whom it is to be used, but cannot be proved by *oral* admission except when for one of the reasons stated in S. 65, the document itself is not forthcoming. Where a plaintiff sued for a sum said to be due upon a settlement of account and instead of producing and proving

“Oral admissions as to contents of a document are not relevant.”
Comment.
Bom. 1916(a)

the account current between himself and the defendant, produced evidence to prove the admission of the debt, their Lordships of the Privy Council observed: "It is a very dangerous thing to rest a judgment upon verbal admissions of a sum due without very clear evidence, especially when when there are other means of proving the case, if a true one." (10 I. A. 79). The object of this section is to get rid of the English rule as laid down in *Slatterie v Pooley* (6 M & W. 669) that the oral admission of a person regarding the contents of a document is admissible even when the document might have been produced as evidence against him. For though what a party himself admits may fairly be presumed to be true, there is no such presumption in favor of the truthfulness of the evidence by which such admission must be proved. If "a man might be deprived of an estate of £10,000 per annum derived from his ancestors through regular family deeds and conveyances, by producing a witness or by one of two conspirators, who might be got to swear that they heard defendant say he had conveyed away his interest therein by deed or had mortgaged or has otherwise encumbered it, (then) by the facility so given, the widest door would be opened to fraud, and a man might be stripped of his estate through this invitation to fraud and dishonesty." (Per Pennefather C. J. in *Lawless v. Qucale*, 8 Ir. L. R. 382) According to *Slatterie v Pooley*, (supra) what A states as to what B, a party, has said respecting the contents of a document which B has seen is admissible; whilst what A states, respecting a document which he himself has seen, is not admissible although in the latter case, the chance of error is single; in the former, double."

[Problem :—A sues B on a sum alleged to be due upon a settlement of account. Instead of producing and proving the account current between himself and B, A produces evidence to prove the admission of the debt. What risks, if any, does A run? C. U. 1928 (b). See above.]

Or unless the genuineness etc.—Oral admissions are admissible to prove that the document produced is the very document which was executed.

5. Admission without prejudice.—(1) In civil cases no admission is relevant, if it is made either upon an express condition that evidence of it is not to be given, or under circumstances from which the Court can infer that the parties agreed together that evidence of it should not be given. (S. 23)

(2) But nothing in this section shall be taken to exempt any barrister, pleader, attorney or vakil from giving evidence of any matter of which he may be compelled to give evidence under section 126 (Expl.)

Principle.—This section protects communications made without prejudice. Confidential overtures of pacification and other offers or proposals between litigating parties, expressly or impliedly made *without prejudice* are excluded on grounds of public policy. For without this protective rule, it would often be difficult to take any step towards an amicable compromise or adjustment; and as Lord Mansfield has observed: "All men must be permitted to buy their peace, without prejudice to them, should the offer not succeed." (Taylor).

This section does not apply to *criminal* cases.

The legal adviser of a party will not be prevented from giving evidence of any communication made in furtherance of any illegal purpose or of any fact showing that a crime or fraud has been committed since his employment. (*Vide* S. 126 *infra*)

The expression "without prejudice" means this: "I make you an offer which you may accept or not, as you like; but if you do not accept it, my having made it, is to have no effect at all." (L. R. 6 Ch. 822).

"Admissions
...estoppels."
Comment.
Rom. 1914(b).

6. **Effect of admission.**—Admissions are not conclusive proof of the matters admitted, but they may operate as estoppels under Secs. 115-117 *infra*. (S. 31)

What is the
evidentiary
value of
admission?
C.U. 1910(b);
Rom. 1909(b).

When does an
admission
amount to an
estoppel?
C.U. 1911(a).

Note.—The section deals with the effect, in respect of conclusiveness, of admissions, when proved. Every admission is evidence against the person by whom it is made; but it is always for the Court to consider what weight, if any, is to be given to an admission or any other evidence; it is not conclusive merely because it is legally admissible. It is only so in certain cases, for instance, where it has been acted upon by the party to whom it is made. Though admission may be proved against the party making them, it is always open to the maker to show that the statements were mistaken or untrue, except in the cases in which they operate as estoppels (*vide* S. 115 *post*). Thus admissions, whether written or oral, ordinarily operate only as *prima facie* and *rebuttable* evidence against their makers who are at liberty to contradict them and not as *irrebuttable* ones unless they fall under S. 115 *et seq.* when they are acted on by the persons to whom they are made.

The expressions "conclusive proof" has been defined in S. 4. *Vide* p. 44 *ante*.

B.—CONFESSIONS (Ss. 24-30.)

Define confession.
All. 1916.
What is a
confession
relevant in
criminal
proceedings
and when it
may not be
proved? Give
reasons in
support of
your answer.
C.U. 1910(b).

The word "confession" has not been defined anywhere in this Act. It may be defined as an admission made at any time by a person charged with a crime stating or suggesting the inference that he committed the crime. (Stephen's Digest). The substantive law of confession is contained in Ss. 24-30 of this Act and the adjective law in Ss. 164, 364 and 533 of the Criminal Procedure Code. Confessions are received in evidence in criminal cases, upon the same principle on which admissions are received in civil cases, namely the presumption that a person will not make an untrue

statement against his own interest. "Indeed all reflecting men are now generally agreed that *deliberate and voluntary confessions of guilt, if clearly proved*, are among the most effectual proofs in the law, their value depending on the psound resumption, that a rational being will not make admissions prejudicial to his interest and safety, unless when urged by the promptings of truth and conscience." (Taylor). A confession if duly made and satisfactorily proved, is sufficient alone to warrant a conviction, without any corroborating evidence. "A free and voluntary confession of guilt made by a prisoner, whether in the course of conversation with private individuals or under examination before a Magistrate, is admissible in evidence as the highest and most satisfactory proof." (Russel on Crimes.)

The Evidence Act lays down the following rules in regard of confessions :—

1. A confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the Court to have been caused by any inducement, threat or promise, having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the Court, to give the accused person grounds, which would appear to him reasonable, for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceeding against him. (S. 24)

Note.—The principle upon which the confessions are received in evidence are that no person will *voluntarily* make any statement which is against his interest unless it is true. The first essential point regarding the relevancy of confession is that it is *freely* and *voluntarily* made. No confession is considered voluntary which is made under the circumstances mentioned in Ss. 24-26 and is therefore not admissible against the accused ; but confessions made

What are the provisions embodied in the Evidence Act regarding confessions ? Bom. 1909(b), 1908 (b), 1904. State the difference between admission and confession regarding evidentiary value. C. U. 1910(b). Bom. 1907(b). Discuss the safeguards which the Legislature has provided in order to make confession admissible. Bom. 1912(a), 1907 (b). Is a confession induced by the promise to give the prisoner glass of spirits or to strike off his hand-cuff a bar to the admissibility of the confession ? All. 1905. In what cases oral admission as to the contents of document in civil cases and confessions made by

accused persons in criminal cases are relevant? Punj. 1916. What are the provisions in the I. E. Act governing the relevancy or otherwise of extra-judicial confessions? Can such confessions be ever used against third person and if so, subject to what conditions? Mad. 1915.

under the circumstances mentioned in Ss. 27-29 are relevant and admissible.

Essentials.—To make a confession, inadmissible in evidence, under S. 24, three things are necessary :—

1. The confession must (appear to the court to) have been caused by any inducement, threat or promise.

2. The inducement, threat or promise—

(a) must have reference to the charge against the accused person :

(b) must have proceeded from a person in authority ; and

(c) must (in the opinion of the Court) have been sufficient to give the accused person reasonable grounds for supposing that by making the confession he would gain any advantage or avoid any evil

3. The advantage to be gained or the evil to be avoided—

(a) must be of a *temporal* nature, and

(b) must have reference to the proceedings against the accused.

A confession is only admissible, if it is made *voluntarily*.* The principle, upon which confessions, like other admissions, are received, is the presumption that no person will voluntarily make a statement which is against his interest, unless it be true. But the force of the confession depends upon its voluntary character. No confession is

* In England, it is for the prosecution to prove that it was made voluntarily. But in this country, the prosecution for the purpose of introducing a confession need not negative any inducement, threat or promise unless there is good reason to suspect that something of the kind has taken place; and in the absence of evidence it is not to be presumed that a statement objected to on the ground of its having been induced by illegal pressure is inadmissible. A confession is to be presumed voluntary, unless the contrary is shown.

voluntary, if the making of the confession appears to the Court to have been caused by any inducement, threat or promise proceeding from a *person in authority* and having *reference to the charge* against the accused person and if in the opinion of the Court, such inducements etc. were sufficient to give the accused person *reasonable* ground for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in regard to such proceedings against him. The object to the rule relating to the exclusion of confessions is to exclude all confessions which may have been procured by the prisoner being led to suppose that it would be better for him to admit himself to be guilty of an offence which he really never committed. There is a danger that the accused may be led to criminate himself falsely. Moreover the admission of such evidence would naturally lead the agents of the police, while seeking to obtain a character for activity and zeal, to harass and oppress prisoners, in the hope of wringing from them a reluctant confession.

"Appears to the court"—The use of the word "appears" seems to indicate that this section does not require positive proof, within the meaning of section 3, of improper inducement to justify the rejection of a confession. A court might perhaps in a particular case fairly hesitate to say that it was *proved* that the confession had been unlawfully obtained, and yet might be in a position to say that such *appeared* to it to have been the case. (2 Bom. L. R. 776).

"Inducement, threat or promise."—The inducement etc. need not be expressed, but may be implied from the conduct of the person in authority nor need it be made directly to the prisoner : it is sufficient if it may reasonably be presumed to have come to his knowledge, provided of course, it appears to have induced the confession.

"Having reference to the charge etc."—The inducement, threat or promise must have reference to the charge against the accused, and if made as to one charge will not effect a confession as to a totally different charge. The inducement, promise or threat to have the effect of excluding the confession must be such as is calculated to influence the prisoner's mind with respect to his escape from the charge. An inducement etc. relating to some *collateral* matter unconnected with the charge *e.g.* promise to give the prisoner some spirits or to let time to see his wife and the like, will not exclude a confession.

State briefly the law governing the admissibility of confessions in criminal cases. What evidentiary value will you assign to retracted confessions? Distinguish between a confession and an admission.
 Bom. 1916(a).

"Proceeding from a person in authority."—No definition has been given in this Act, of the expression "persons in authority." The following definition is given in Stephen's Digest, Art 22 : "The prosecutors, officers of justice having the prisoner in custody, Magistrates and other persons in similar positions, are persons in authority. The master of the prisoner is not, as such, a person in authority if the crime of which the person making the confession is accused was not committed against him." Prosecuting and arresting officers, Magistrates, Jailors and all persons in position similar to the above, are persons in authority. (Best.)

A confession made to, but not induced by, a person in authority is admissible, while conversely, a confession induced by, though not made to, such person will be rejected.

Confessions procured by inducement etc. of persons *not in authority* are admissible.

"Sufficient in the opinion of the Court etc."—This Section leaves it entirely to the Court to form its own opinion as to whether the inducement, threat or promise was sufficient to lead the prisoner to suppose that he would derive some benefit or avoid some evil of a temporal nature by the confession. It is for the Judge to consider whether the words used were such as to convey to the mind of the

person addressed an intimation that it will be better for him to confess that he committed the crime or worse for him if he does not.

"Temporal nature."—The inducement etc. must be of a *temporal* kind. Unless the inducement etc. be of a temporal nature calculated to influence the prisoner's mind having reference to the charge, the confession is relevant. Any inducement of a spiritual nature having reference to a future state of reward or punishment does not affect the admissibility of the confession under this section.

"In reference to the proceedings against him."—An inducement, promise or threat as to some purely *collateral* matter will not exclude the confession.

2. If such a confession as is referred to in sec. 24 is made after the impression caused by such inducement, threat or promise has, in the opinion of the Court, been fully removed it is relevant. (S. 28)

Note.—This section forms an exception to the law provided by S. 24 and as a qualification of that section should be read together with it. A confession is admissible if made after the impression caused by any inducement, threat or promise, has been fully removed, because, then, it becomes free and voluntary. There must be strong and cogent evidence that the influence of the inducement really has ceased.

3. If a confession is otherwise relevant, it does not become irrelevant merely because it was made under a promise of secrecy, or in consequence of a deception practised on the accused person for the purpose of obtaining it, or when he was drunk or because it was made in answer to questions which he need not have answered, whatever may have been the form of those questions, or because he was not warned that he was

What effect has promise of secrecy or deception practised

upon the accused on the relevancy of confession ? C.U. 1910(b). A is charged with the murder of B. He makes a confession (1) to his wife under a promise of secrecy ; (2) to his friend in a state of intoxication, (3) to his religious preceptor under moral exhortation ; and (4) to his attorney for the purpose of his defence. These persons are called as witnesses. Test the admissibility of the evidence in each case. Bom. 1914 (b).

not bound to make such confession, and that evidence of it might be given against him. (S. 29)

Note.—A confession which is relevant does not become irrelevant merely because it was made—

- (1) under a promise of secrecy ; or
- (2) in consequence of a deception practised on the accused person for the purpose of obtaining it ; or
- (3) when the accused was drunk ; or
- (4) in answer to questions which he need not have answered, or
- (5) in consequence of the accused not having received any warning that he was not bound to make it and that it might be used against him

Promise to secrecy.—When a prisoner makes a confession of guilt to a person who gives assurance on oath that he would not mention it to any one, it is admissible in evidence (*R. v. Shaw*, 6 C. & P. 372.)

Deception.—When a confession is obtained by artifice or deception it is not inadmissible in evidence. A confession „obtained by a policeman by saying to the prisoner, that his brother-in-law had given out that he (prisoner) was guilty, was held admissible. (20 W. R. Cr 33).

Warning.—No warning is necessary to make a confession admissible in evidence. (But it is more safe for a Magistrate to warn the accused when he is brought in by the police and is ready to make a confession—*See* 1 B. L. R. Cr. 15).

4. No confession made to a Police Officer, shall be proved as against a person accused of any offence. (S. 25).

Note.—The rule enacted by this section is without qualification and a confession made to a Police Officer *under any circumstances* is inadmissible in evidence, except so far as is provided by S. 27.

The object of this section and section 26, is to prevent the practice of torture by the police for purpose of extracting confessions from accused persons. Under this section no confession made to a *Police-Officer* is admissible against the accused. Under sec. 26 confession made to a *private person* by a person *in the custody of the police* is inadmissible in evidence.

"No confession etc."—Sec. 25 does not exclude all statements by an accused to a Police but only *confessions*. An admission made by an accused person to a Police-Officer may be proved if it does not amount to a confession *i. e.*, if it is not a statement by him that he committed the crime with which he is charged or a statement suggesting the inference that he did so.

"As against a person etc."—This section only provides that no confession etc. shall be proved *against* a person accused of any offence. It may, however be used for other purposes.

Police-Officer.—The term should be read, not in a strict technical sense but according to its comprehensive and popular meaning. It applies to every Police-Officer and is not to be restricted to officers of the regular police force.

Confession to the Police in the presence of a Magistrate.—The provisions of this section are unqualified and consequently, a confession made to a Police-Officer, even though made in the presence of a Magistrate is inadmissible in evidence. (24 W. R. Cr. 82.

5. No confession made by any person whilst he is in the custody of a Police Officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person. (S 26).

Note.—The object of this section also is to prevent the abuse of their powers by the Police. Sec. 25 excludes confessions to a *Police-Officer* under any circumstances. The

A was found carrying away a box at night. B a policeman on duty asked him about the ownership of the box. A said that the box belonged to him. In a trial for theft regarding the box, could A's statement be made admissible against him ? C.U.'21(Supl.)

present section excludes confession *to any person other than a Police-Officer*, while the person making it is in the position to be influenced by a Police-Officer unless the free and voluntary nature of the confession is secured by its being made in the immediate presence of a Magistrate in which case the confessing person has an opportunity of making a statement uncontrolled by any fear of the Police.

Distinction between S. 25 & S. 26—Sec. 25 applies to all confessions to Police-Officers; Sec. 26 to all confessions to any person other than a Police-Officer, made by persons whilst in the Police custody. This last-mentioned confession is inadmissible unless made in the immediate presence of a Magistrate. But according to Sec. 25 confession to a Police-Officer is inadmissible even though it is made in the presence of a Magistrate.

Secs. 25 and 26 do not overlap each other. The two sections lay down two clear and definite rules. Sec. 25 lays down a general proposition against the admissibility of confessions made to Police-Officers. Sec. 26 carries the principle further by rendering similar confession inadmissible, even though *not made to Police-Officers*, but made by a person *whilst he is in the custody of a Police Officer*. In Sec. 25 the criterion for excluding the confession is the answer to the question "To whom was the confession made?" If the answer is that it was made to a Police Officer the law says that such confession shall be absolutely excluded from evidence because the person to whom it was made is not to be relied on for proving such a confession and he is, moreover, suspected of employing coercion to obtain confession. On the other hand, the criterion adopted in Sec. 26 for excluding is the answer to the question. "Under what circumstances was the confession made?" If the answer is that it was made whilst the accused was in the custody of a Police-Officer the law lays down that such a

confession shall be excluded from evidence, unless it was made in the immediate presence of a Magistrate.

Custody.—There is no necessity to prove a formal arrest. It will be held to be a sufficient custody, if the accused is present before the Police and cannot depart at his own free will. (3 M. H. C. R. 318).

A person under arrest on a charge of murder, was taken in a conveyance from the place, where the offence was committed, to another place, and a friend drove with her, mounted police riding in front ; during a short absence of the policeman necessitated by the exigencies of the journey, the accused made a statement to her friend, with reference to alleged offence. *Held*, that notwithstanding the temporary absence of the policeman, the accused was still in custody and that the witness should not be asked as to what the prisoner said to him. (20 Bom. 165).

[**Problem** :—M and H were charged with the offence of murder and were in the lock-up of the Magistrate under trial. M was sent by the Magistrate to the dispensary in order to be treated for a malady which involved an examination of the patient in private. Two policemen took the accused from the lock-up to the dispensary, and waited outside on the verandah, while the accused was being examined by the doctor. During the few minutes of his examination by the doctor the accused made a confession of his guilt to another patient who happened to be there. At the trial before the Sessions Judge, the question arose whether the confession would be admissible in evidence. Discuss the question, Bom. 1917 (8). (Ans. The confession is not admissible. 19 Bom. L. R. 683)].

6. When any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a Police Officer, so much of such information, whether it amounts to a confession or not, as

How much of information received from accused may be proved. When can a

confession made by any person while he is in the custody of the police officers be proved as against such person?

C.U.1917(a). When and to what extent are statements made by the accused to a police-officer admissible? Bom. 1913(a). A was charged with the murder of a girl for the sake of her ornaments. He was promised by the police that if he produced the ornaments he would be let off. He took the police to a certain place and pointed out and produced certain ornaments which the girl was wearing at the time of her death. Is this evidence admissible? Give reasons. Bom. 1916(a).

relates distinctly to the fact thereby discovered may be proved. (S. 27).

Note—This section serves as a proviso to Ss. 25 and 26 and it also qualifies S. 24 (6 All. 509; 45 Cal. 557). * The broad ground for not admitting confession made under inducement etc. (S. 24) or to a Police-Officer (S. 25) or by persons whilst in Police-custody (S. 26) is the danger of admitting false confession, but the necessity for the exclusion disappears in a case provided for by this section when the truth of the confession is guaranteed by the discovery of facts in consequence of the information given.

"Discovered in consequence of information etc."—The confession must constitute the information through which the discovery was made in order to render the statement admissible.

The test of the admissibility, under this section, of information received from an accused person in the custody of a Police-Officer whether amounting to a confession or not is:—"Was the fact discovered by reason of the information and how much of the information was the immediate cause of the fact discovered, and as such a relevant fact?" (12 Mad. 153).

The word "discovery" in this section means the finding, upon search or enquiry, of articles connected with the crime or other material fact. It was formerly held by the Bombay and Allahabad High Courts that where an article said to be connected with an offence was produced by the party himself after giving information in respect of it, the article could not be said to have been discovered in consequence of the information. (See 10 Bom. 595, 4 All. 198 and 6 All. 509 *per* Straight J.) But this view has been subsequently dissented from. See 14 Bom. 260 and 25 Cal. 413, where it has been held that the statement of an accused person in

* *Mathew, J.* holds the contrary view. According to him Sec. 27 is a proviso only to Sec. 26 and not to Secs. 25 and 24 (6 All. 557).

the custody of the Police is equally admissible under this section whether it is made in such detail as to enable the Police to discover by themselves or whether it be of such a nature as to require the assistance of the accused to enable them to discover the fact. See also 19 W. R. Cr. 57. An accused was charged under S. 411 1. P. C. with dishonestly receiving stolen property. In the course of the Police investigation the accused was asked by the Police where the property was. He replied that he had kept it and would show. He said that he had buried the property in the fields. He then took the Police to the spot where the property was concealed and with his own hands disinterred the earthen pot in which the property was kept. *Held* that the statement of the accused that he had buried the property in the fields was admissible under this section as it distinctly set the Police in motion and led to the discovery of the property. (14 Bom. 260). [But the statement that "he had kept" the property was not necessarily connected with the fact discovered and was therefore not admissible. (*Ibid*)].

"So much of such information.....as relates distinctly to the fact thereby discovered."—It is not all statements connected with the production or finding of property which are admissible; those only which lead *immediately* to the discovery of property and so far they do lead to such discovery are properly admissible. Whatever be the nature of the fact discovered, that fact must in all cases, be itself *relevant* to the case and the connection between it and the statements made must have been such that that statement constituted the information through which the discovery was made in order to render the statement admissible. Other statements connected with the one thus made evidence and so *mediately* but not necessarily or directly connected with the fact discovered are not to be admitted, as this would rather be an evasion than a fulfilment,

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of the law which is designed to guard prisoners accused of offences against unfair practices on the part of the Police. (11 Bom. H. C. R. 242). No judicial officer should allow one word more to be deposed to by a Police-Officer detailing a statement made to him by an accused in consequence of which he discovered a fact than is absolutely necessary to show how the fact that was discovered is connected with the accused, so as in itself to be a relevant fact against him. Sec. 27 was not intended to let in a confession generally, but only such a particular part of it as set the person to whom it was made in motion and led to his ascertaining the fact or facts of which he gives evidence. (6 All. 509). For instance, a man says: "You will find a stick at such a place; I Killed Rama with it." A Policeman, in such a case, may be allowed to say that he went to the place indicated, and found the stick; but any statement as to the confession of murder would be inadmissible. If instead of "you will find" the prisoner has said "I placed a sword or knife in such a spot" where it was found, that too, though it involves an admission of a particular act on the prisoner's part, is admissible, because it is the information which has directly led to the discovery, and is thus distinctly and independently of any other statement connected with it. But if besides this, the prisoner has said what induced him to put the knife or sword where it has been found, that part of his statement, as it has not furthered, much less caused, the discovery, is not admissible. The words in sec. 27 of the Evidence Act, "whether it amounts to a confession or not" are to be read as qualifying the word "information" in the immediately preceding context, not the words "so much," and the effect is that although ordinarily a confession of an accused while in custody, would be wholly excluded, yet if, in the course of such a confession, information leading to the discovery of a relevant fact has been given, so much of the information as distinctly led to this result may be to, though as a whole, the statement would consti-

tute a confession which the preceding sections are intended to exclude. (11 Bom. H. C. R. 242). "Statements admissible under this section are so admissible because the discovery rebuts the presumption of falsity arising from the fact of their being made under inducement or to the Police or to others while in Police-custody. The discovery proves not that the whole but that *some* portion of the information given is true, namely, so much of the information as led *directly and immediately* to or was the proximate cause of the discovery; only such portion of the information is guaranteed by the discovery and hence only such portion of the information is admissible. A prisoner's statement as to his knowledge of the place where a particular article is to be found, is confirmed by the discovery of that article is thus shown to be true. But any explanation as to how he came by the article* or how it came to be where it is found is not confirmed by the discovery, and as the presumption of falsity as to these other statements is not rebutted, therefore, proof of them is prohibited (Woodroffe, 273). .

"Person accused of any offence etc."—In order to bring a case within the scope of this section it is necessary that the party making the statement should be both *accused* and in *custody of a Police-officer* at such time. (6 All. 509, *per* Oldfield and Mahmood JJ.)

7. When more persons than one are being tried jointly for the same offence*, and a confession made by one of such persons affecting himself and some other of such persons is proved, the Court may take into consideration such confession as against such other person as well as against the person who makes such confession. (S. 30)

Confession of co-accused.

Illustrations.—(a) A and B are jointly tried for the murder of C. It is proved that A said,—'B and I murdered

C. U. 1914(b), 1916 (b).

* "Offence," as used in this section, includes the abetment of, or attempt to commit the offence. (Expl.)

C.U. 1916 (b), C.' The Court may consider the effect of that confession as against B.

(b) A is on the trial for the murder of C. There is evidence to show that C was murdered by A and B, and that B said,—‘A and I murdered C.’ This statement may not be taken into consideration by the Court against A, as B is not being jointly tried.

“The general rule of English law is that the confession of an accused person is only evidence against himself and cannot be used against others. An exception to this rule has been introduced by I. E. Act.” State what that exception is. Give illustrations. C.U. 1917(a). Can the confession of an accused be used against his co-accused? Bom. 1913(a). When is a confession by one accused admissible against his co-accused? How far such a confession may be taken into consideration in convicting the co-accused?

Note—This section is contrary to the English law on the point. This section forms an important exception to the general principle of law that the confession of an accused person is not evidence against any one but himself. The principle appears to be that where a prisoner makes a clean breast of it, and unreservedly confesses his own guilt, and at the same time implicates another person who is jointly tried with him for the same offence, his confession may be taken into consideration against such other person as well as against himself, because the admission of his own guilt, operates as a sort of sanction, which to some extent, takes the place of ‘the sanction of an oath and so affords some guarantee that the whole statement is a true one. (7 All. 856. When a person admits guilt to the fullest extent and exposes himself to the pain and penalties provided for the guilt there is a guarantee for his truth and the Legislature provides that his statement may be considered against his fellow prisoners charged with the same crime.” (Per West J. in 6 Bom. 288).

Essentials :—A confession by an accused person *may be taken into consideration* against the other co-accused, provided the following conditions are satisfied :—(1) The person making the confession and the person or persons against whom it is to be used must be *tried jointly*. (2) The trial must be *for the same offence*. (3) The confession must implicate the confessing person himself to the same extent as it implicates the person against whom it is to be used. (4) The confession must be *legally proved*.

Tried jointly.—This section applies only to cases in which confession is made by a prisoner tried *at the same time* with the accused person against whom the confession is used (21 W. R. Cr 65) The joint trial should be *legal*. If from any cause the accused who made the confession cannot be legally tried with the accused against whom the confession is to be used, the court should not attach any value to the confession. There should be a joint trial of the accused. On the trial of more persons than one jointly for the same offence where one of them pleads guilty, and is convicted and sentenced, the person so pleading guilty is no longer on his trial and cannot be jointly tried with others who plead not guilty A confession by that person affecting him, and others cannot, therefore, be taken into consideration as against such others under this section.

For the same offence.—This expression means an offence coming under the legal definition *i. e.*, under the same section of the law. The practical test to determine whether accused persons are being jointly tried for the same offence is the identity of the section of the Penal Code or the law under which the charge is laid against them.

Confession affecting himself and some other of such persons.—The confession must affect both the person confessing and the other accused persons. Statements made by a prisoner which implicate his fellows and exculpate himself are not regarded as evidence. The statement of one prisoner under S. 30 unless the parties are admittedly in *pari delicto*, that is, when the confessing prisoner implicates himself substantially to the same extent as his co-prisoner whom he is criminating. In fact, to use a popular phrase, the confessing prisoner must tar himself and the person or persons he implicates, with one and the same brush.

Made.—The confession may have been made at any time before or at the trial. It is not necessary that the

Bom. 1914(b), 1910 (b). A and B are on their trial for murder. A pleads guilty. His plea is recorded but he is neither convicted nor sentenced. Can his confession be used against B at the trial? C.U. 21, (Suppl.) When more persons than one are jointly tried for the same offence and a confession is made by one of them affecting himself and some other of such persons how far the confession can be used against such persons? Panj. 1917.

confession should have been made during the joint-trial or in the presence of the persons against whom it is sought to be used. (14 C. W. N. 11).

Proved.—The confession of a prisoner which affects his co-prisoner becomes admissible in evidence only when duly proved.

"May take into consideration."—The expression means that if there is other evidence, which, if true, would establish the charge, the confession of a person who is being jointly tried for the same offence may be taken into consideration by the court and be used for the purpose of *corroborating* the other evidence. Confession of a co-accused can only be "taken into consideration" against the other accused, but it is not "evidence" within the definition given in S. 3 of the Evidence Act and *it cannot, therefore, alone form the basis of a conviction.* (15 Bom. 66 ; 7 Mad. 102). The confessions referred to in this section are not to have the force of sworn evidence. (22 All. 445). The courts have established the following rules with regard to this species of evidence :—

- (1) If there is (a) absolutely no other evidence in the case or (b) the other evidence is inadmissible such confession alone will not sustain a conviction.
- (2) (a) The confessions of co-prisoners to be rendered trustworthy must be corroborated (b) *alunde* by independent evidence and not by the testimony of accomplices or approvers (c) as well in respect of the identity of all the persons affected by it, as of the *corpus delicti*.
- (3) The confessions of prisoners are not sufficient corroboration of the testimony of an accomplice, either as to the *corpus delicti* or the identity of the persons affected. (Woodroff, p. 286 *et seq.*)

Confession of co-accused and testimony of accomplice :—The confession of a co-accused is inferior in

value to the evidence of an accomplice made upon oath and subject to cross-examination and a conviction cannot be based upon such a confession (11 Cal. 547). "Confession of a co-accused under S. 30 is not itself a substantive evidence. It can be used only in a subsidiary manner in connection with the substantive evidence in the case. It thus stands on a perfectly different footing from the testimony of an accomplice under S. 133 of the Evidence Act. The testimony of an accomplice is substantive evidence in the true sense of the term ; a conviction may legally proceed upon it without corroboration, though the general practice of the court is to require corroboration under S. 144 ill. (b)." (Sarkar)

Retracted confession.—There is a conflict of rulings on the value of a retracted confession as evidence against a co-accused and against the person making it. According to one view, a retracted confession should carry practically no weight as against a person other than the maker, because it is not made on oath, it is not tested by cross-examination and its truth is denied by the maker himself, who has thus lied on one or other of the occasions and the very fullest corroboration would be necessary in such a case far more than would be demanded for the sworn testimony of an accomplice on oath. A conviction on an uncorroborated and retracted confession of an accomplice is, therefore, improper and bad (28 Cal. 689 ; 5 C. W. N. 670 ; 44 I. C. 179) According to the contrary view a retracted confession may be taken into consideration *i.e.* used in evidence against not only the person making it but also against the person tried jointly with the confessing accused for the same offence and a conviction based on the unsupported evidence afforded by the confession of a co-accused would not be unlawful. (29 All. 434).

As regard the person making the confession, it has been held in some cases that it is not safe to convict an accused

person on his retracted confession standing by itself uncorroborated. (See 27 Cal. 295 ; 12 Mad. 123 ; 18 All. 78). Although as a matter of law a conviction may be based upon a retracted confession if the court comes to the unhesitating conclusion that it is voluntary, yet as a matter of prudence, no conviction should be based upon a retracted confession. (60 I. C. 56, Patna) But in other cases, it has been held that there is no rule of law that a retracted confession cannot be treated as evidence unless it is corroborated in material particulars by independent reliable evidence and that a retracted confession may even without any corroborative evidence form the basis of a conviction. (See 29 All. 434 ; 23 Bom. 315 ; 21 Mad. 83 ; 25 Bom. 168 ; 41 I. C. 155 ; 20 All. 133)

2. Statement by Persons who cannot be called as Witnesses. (Ss. 32-33.)

When are statements of relevant facts made by a deceased person admissible in evidence ? C.U. 1916(b), 1914 (a), 1910 (a), 1901, 1900. "Evidence may be given of statements made by a person who is not actually called before the court." Given two illustrations. C.U. '19(a).

Statement made by persons who are dead or otherwise incapacitated from being called as witnesses are admitted in the cases mentioned in sections 32 and 33. The general ground of admissibility of the evidence mentioned in those two sections is that in the cases mentioned therein no better evidence is to be had. But before the statements or depositions under sec. 32 or 33 are admissible, it must be shown that the circumstances and conditions mentioned in and imposed by those sections exist, such as, that the person who made the statement sought to be proved is dead or cannot be found or the like. The burden of proving this is on the person who wishes to give evidence.* Whenever any statement relevant under sec. 32 or 33 is proved, all matters may be proved either in order to contradict or corroborate it or in order to impeach or confirm the credit of the person by whom it was made, which might have been proved if that person had been called as a witness and had denied upon cross-examination the truth of the matter suggested.†

* Vide Ss. 101 and 136 *infra*

† Vide Ss. 138, *infra*.

Secs. 32 and 33 lay down the following provisions :—

1. Statement by persons not sworn as witnesses.—Statements written or verbal, of relevant facts made, by a person :—

- (a) who is dead* or
- (b) who cannot be found, or
- (c) who has become incapable of giving evidence, or
- (d) whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the court unreasonable, are themselves relevant facts in the following cases :—

Statements by person not sworn as witness, State the circumstances under which verbal statements made by a deceased person are relevant facts. State what other circumstances are relevant. C.U. 26 (b).

(1) When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question.†

Statement relating to cause of death or dying declarations.

N. B.—Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question.‡

(2) When the statement was made by such person in the ordinary course of business, and in particular, when it consists of any entry or memorandum made by him in books kept in the ordinary course of business, or in the discharge of professional duty ; or of an acknowledgment written or signed by him of the receipt of money, goods,

Statement made in the course of business.

* An important difference between the law in India and in England is that in the latter country this class of evidence can be received only when the author of the statement is dead.

† *Vide* illustration (a).

‡ Compare English law : *Vide infra*.

securities or property of any kind ; or of a document used in commerce written or signed by him, or of the date of a letter or other document usually dated, written or signed by him. *

Statement
against
interest of
maker.

(3) When the statement is against the pecuniary or proprietary interest of the person making it, or when, if true, it would expose him or would have exposed him to a criminal prosecution or to a suit for damages. †

Statements
giving opinion
as to to pub-
lic right or
custom or
matter of
public or
general
interest.

(4) When the statements give the opinion of any such person, as to the existence of any public right or custom or matter of public or general interest of the existence of which, if it existed, he would have been likely to be aware, and when such statement was made before any controversy as to such right, custom or matter had arisen. ‡

Statements
relating to
existence of
relationship.

(5) When the statement relates to the existence of any relationship by blood, marriage or adoption between persons as to whose relationship by blood, marriage or adoption the person making the statement had special means of knowledge, and when the statement was made before the question in dispute was raised. §

Statement
made in will
or deed
relating to
family affairs.

(6) When the statement relates to the existence of any relationship by blood, marriage or adoption between persons deceased, and is made in any will or deed relating to the affairs of the family to which any such deceased person belonged, or in any family pedigree, or upon any tombstone, family portrait or other thing on which such statements are usually made and when such statement was made before the question in dispute was raised. **

* Vide illa. (b), (c), (d), (g), (h), and (j) of this section and illa. (b) and (c) of S. 21.

† Vide ill. (e).

‡ Vide illa. (i) and (j)

§ Vide illa. (f), (h), and (l)

** Vide ill. (m).

(7) When the statement is contained in any deed, will or other document which relates to any such transaction as is mentioned in section 13, clause (a) *

Statements in document relating to transaction mentioned in S. 13 cl. (a). Statements made by a number of persons, expressing feelings relevant to matter in question.

(8) When the statement was made by a number of persons, and expressed feelings or impressions on their part relevant to the matter in question. ** (S. 32).

Illustrations :—(a) The question is, whether A was murdered by B ; or A died of injuries received in a transaction in the course of which she was ravished. The question is, whether she was ravished by B ; or The question is whether A was killed by B under such circumstances that suit would lie against B by A's widow. Statements made by A as to the cause of his or her death, referring respectively to the murder, the rape, and the actionable wrong under consideration, are relevant facts.

(b) The question is as to the date of A's birth. An entry in the diary of a deceased surgeon, regularly kept in the course of business, stating that, on a given day, he attended A's mother and delivered her of a son, is relevant fact.

(c) The question is whether A was in Calcutta on a given day. A statement in the diary of a deceased solicitor regularly kept in the course of business, that, on a given day, the solicitor attended A at a place mentioned, in Calcutta, for the purpose of conferring with him upon specified business, is a relevant fact.

(d) The question is whether a ship sailed from Bombay harbour on a given day. A letter written by a deceased member of a merchant's firm, by which she was chartered, to their correspondents in London to whom the cargo was consigned, stating that the ship sailed on a given day from Bombay harbour, is a relevant fact.

* *Vide* illustrations under S. 13.

Vide III. (a).

(e) The question is whether rent was paid to A for certain land. A letter from A's deceased agent to A, saying that he had received the rent on A's account and held it at A's orders, is a relevant fact.

(f) The question is whether A and B were legally married. The statement of a deceased clergyman that he married them under such circumstance that the celebration would be a crime, is relevant.

(g) The question is, whether A, a person who cannot be found, wrote a letter on a certain day. The fact that a letter written by him is dated on that day is relevant.

(h) The question is, what was the course of the wreck of a ship. A protest made by the Captain, whose attendance cannot be procured, is a relevant fact.

(i) The question is whether a given road is a public way. A statement by A, a deceased headman of the village that the road was public, is a relevant fact.

(j) The question is, what was the price of grain on a certain day in a particular market. A statement of the price made by a deceased banya in the ordinary course of his business, is a relevant fact.

(k) The question is whether A, who is dead was the father of B, A statement by A that B was his son, is a relevant fact.

C.U. 1920(b). (l) The question is, what was the date of the birth of A. A letter from A's deceased father to a friend, announcing the birth of A on a given day, is a relevant fact.

G.U. 1921(b). (m) The question is, whether and, when, A and B were married. An entry in a memorandum book by C, the deceased father of B, of his daughter's marriage with A on a given date, is a relevant fact.

(n) A sues B for a libel expressed in a painted caricature exposed in a shop window. The question is as to the similarity of the caricature and its libellous character. The

remarks of a crowd of spectators on these points may be proved.

Note.—This and the following section constitute further exceptions to the general rule that hearsay is no evidence. As a general rule, oral evidence must be direct* and not hearsay, for it is always desirable in the interest of justice to get the person, whose statement is relied upon, into court for his examination in the regular way in order that many possible sources of inaccuracy and untrustworthiness can be best brought to light and exposed, if they exist, by the test of cross-examination. But in the case of statements made by persons who are dead or otherwise incapacitated from being called as witnesses the law under certain circumstances dispenses with direct oral evidence of the fact and with the safeguard for truth provided by cross-examination and the sanction of an oath, and allows the statements to become evidence, as in the cases in question, no better evidence is to be had and as the probability of such statements being true is deemed to be partially guaranteed by the peculiar circumstances under which they are made.†

Under what circumstances and whose statements of relevant facts are admissible in evidence under S. 32 of the Act? Bom. 1908(a). Under what circumstances statements of relevant facts made by persons who are dead or cannot be found, are themselves relevant facts? Punj. 1917.

The statements referred to in all the eight clauses of section 32 are evidence *against all the world* unlike the statement relating to admissions (Secs. 17-31) which may only be proved as against the person who made them or his representatives in interest.**

Statements written or verbal.—The expression includes signs made by a dying person, who is unable to

* *Vide S. 60 infra.*

† *Sections 32-38 contain elaborate provisions as to particular classes of statements which are exceptions to the general rule against hearsay and it will be found on careful examination that in almost all the cases where the rule excluding the evidence is relaxed, the derivative evidence received is guarded by some security which renders it more trustworthy than derivative evidence in general.

** An admission may be proved by or on behalf of the person making it when it is of such a nature that, if the person making it were dead it would be relevant as between third persons under s. 33 (*Vide s. 21 ante*).

speak. 'Verbal' means by words. It is not necessary that the words should be spoken. If the term used in the section were 'oral' it might be that the statement must be confined to words spoken by the mouth. But the meaning of 'verbal' is something wider. (7 All. 385 F. B.)

Made by a person who is dead—The death of the witness whose evidence is to be admitted must be proved before the admission of the evidence, either by actual proof or by the facts raising the presumption under Ss. 107 and 108.

Cannot be found—Proof of a diligent search is necessary before tendering the evidence of a witness who cannot be found. There must be evidence that after diligent search and reasonable exertion the witness could not be found.

Incapable of giving evidence—The Court must be satisfied by doctor's certificate or the like, that the witness is not in a position to give evidence.

Whose presence cannot be obtained &c.—This rule is based upon the principle that all judicial investigations must be completed within a reasonable time; otherwise all such investigations may protract to an embarrassing and dangerous length. But it is only in extreme cases of expense or delay that the personal attendance of a witness should be dispensed with.

Clause 1 :—Statements as to cause of death generally known as dying declarations—Such statements must be as to the cause of declarant's death or as to any of the the circumstances of the transaction which resulted in his death. Thus the statement of a deceased person who did not himself charge the accused with having wounded him, to the effect that another person, also deceased, was stabbed by the accused, is *not* admissible in evidence (P. R. No. 17 of 1901). Similarly, the dying declaration of a

A person whose evidence is material is supposed to be dying. What step would be adopted if the proceeding to be taken be (a) civil, (b) criminal? Bom. 1918(a). Define dying declaration. Enumerate the grounds on which dying declarations are admitted in evidence.

person that he had committed the murder of which another was charged is not admissible. (*R. v. Gray*).

The admissibility of dying declarations is said to rest *first*, on the necessity of the case, the necessity arising from this, that the injured person who might be the principal witness is dead and *secondly*, on the presumption that the solemnity of the approach of death impels the party to speak the truth and supplies the obligation of oath.

A necessary condition for the reception of a dying declaration is that the death of the declarant must have actually ensued and this fact must be proved before such declaration is admitted in evidence. [*Visé* S. 104, ill (a)] If the person making a dying declaration chances to live, his statement is inadmissible as a dying declaration under this section though it may be as corroborative evidence under the provisions of S. 157 (4 Bom. L. R. 434).

The person whose declaration is admitted under this clause is considered as standing in the same situation as if he were sworn as a witness. It follows, therefore, that when the declarant, if living, would have been incompetent to testify by reason of imbecility of mind or tender age his dying declaration is inadmissible. (*W. & A*) *

A statement to the Magistrate is admissible under this clause as a dying declaration though it contains a complaint. (36 Cal. 659 : 13 C. W. N. 862).

The only way of proving a dying declaration is by the evidence of some witness, who heard it made, the witness being at liberty to refresh his memory by referring to the note, made by him or read over to him at or about the time the statement was made. (6 C. W. N. 72). S. 91 of the

If a person making a dying declaration happens to live, can the declaration be admitted in evidence ? Bom. 1911(b). When is a dying declaration relevant fact under the Indian Evidence Act ? All. 1916. What is the difference between the English and Indian laws on subject of dying declaration ? What use, if any, can be made of a dying declaration in case of the recovery of the person making it ? What is the law as to the admissibility of a dying declaration in India ? How

* But according to *Mr Field*, under the Evidence Act the question of the competence of the person to bear testimony is not one which affects the admissibility of the statement though it should be given due attention to, in estimating the weight to be allowed to the declaration. Under the English law, however, the declaration must be by a person who can be a competent witness.

does it differ from that in England? State which in your opinion is the sounder law, giving reasons for your opinion.
 Bom. 1917(a). In an action for goods sold and delivered a book is put in containing a account of the goods delivered by the plaintiff's day-man, which it was his duty to sign daily. Objection is taken on the ground of not calling the day-man, who died during the pendency of the suit but before trial. Discuss the admissibility (a) of the book (b) of the entries signed by the deceased. Give reasons.
 C.U. 1911(b).

Evidence Act does not apply to a dying declaration as it is not such a matter as is required by law to be reduced to the form of a document (36 Cal. 659).

The credibility of the declarant may be impeached or confirmed in the same manner as that of a witness.

[**Problem**.—S. was attacked and injured on the 28th May, 1908. On the 29th he went to Alipore and lodged a petition of complaint before the Magistrate who examined him on oath, recorded his statement in compliance with the provisions of S. 200 of the Criminal Procedure Code, and sent him to hospital where he died on the 31st. Can the petition of complaint and the statement recorded by the Magistrate be treated as dying declarations, are they admissible in evidence as dying declarations, and is oral evidence admissible to prove the statements recorded by the Magistrate having regard to S. 91 of the I. E. Act? C. U. 1911 (a). See above]

English Law.—This clause is widely different from the English law upon the subject of "dying declaration," according to which—(a) this description of evidence is admissible in no *civil case* and in criminal case only in the single instance of *homicide i. e.*, murder and manslaughter, where the death of the deceased is the subject of the charge and the circumstances of the death are subject of the dying declaration. On the other hand, under this Act, the statement is relevant *whatever may be the nature of the proceeding* in which the cause of death of the person who made the statement comes into question. And further (b) according to English law, certain conditions are required to have existed at the time of the declaration *viz.*, it is necessary (c) that the *declarant should have been in actual danger of death*: (2) that he *should have been aware of this danger* and have abandoned all hopes of recovery; and (3) that *death should have actually ensued*. The existence of the last condition is, of course, as necessary under

this Act as under the English law, in as much as the statement is admissible only in cases in which the cause of death of the person who made it comes into question. But under this Act, the statement is relevant whether the person who made it was or was not, at the time when it was made, under expectation of death. Of course, before the statement can be admitted, under this clause, the declarant must have died.

Clause 2. Statements made in the course of business.—The considerations which have induced the courts to recognise this species of evidence have been said to be principally these :—That in the absence of all suspicion of sinister motives a fair presumption arises that entries made in the ordinary routine of duty are correct, since the process of invention implying trouble, it is easier to state what is true than what is false ; that such entries usually form a link in a chain of circumstances which mutually corroborate each other ; that false entries would be likely to bring clerks into disgrace with their employers ; that as most entries made in the course of duty are usually subject to inspection of several persons, an error would be exposed to speedy discovery ; and that as the facts to which they relate are generally known but to few persons, a relaxation of the strict rules of evidence in favour of such entries may often prove convenient, if not necessary, for the due investigation of the truth. (Taylor).

But before such statements can be admitted, it must be proved that the person who made them is dead, or cannot be found or has become incapable of giving evidence or that his attendance cannot be procured without an amount of delay or expense, which, under the circumstances of the case, appears to the court unreasonable ; and the burden of proving this is on the person on whose behalf such evidence is sought to be given.

English law.—The English rules as to the admissibility of these statements is subject to several restrictions which, as such, appear to have no place in the Act. For instance, it is necessary under the English law, that *the party making the statement or entry should have a personal knowledge of the facts stated*. But there is no similar provision in this Act, which simply requires that entries in accounts should in order to be relevant be regularly kept in the ordinary course of business ; and although it may, no doubt, be important to show that the person making or dictating the entries had or had not, a personal knowledge of the facts stated, this is a question which affects the value, not the admissibility of the entries. (1 Bom. 610). Again under the English law, *the statement (or entry) in the course of business or professional duty, must be proved to have been made contemporaneously with the facts to which they relate*. The Act does not contain any such restriction (But the weight of the evidence will depend upon the consideration, how far the statement or entry was contemporaneous with the fact to which it relates.)

Ordinary course of business.—The phrase is apparently used to indicate the current routine of business which was usually followed by the person whose declaration it is sought to introduce. The rule laid down in this clause extends only to statements made during the course, not of any particular transaction of an exceptional kind, such as the execution of a deed of mortgage, but of business or professional employment in which the declarant was ordinarily or habitually engaged. The particulars set out in this clause, though not exhaustive, may fairly be taken as indicating the nature of the statements, made in the course of business. The expression "in the ordinary course of business" in the clause must mean 'in the ordinary course of a professional avocation (23 Bom. 70). The "business"

referred to may be of a temporary character. (13 C. W. N. 711. See ill. (b), (c) and (d).

In particular.—The statement may be verbal or written. But the words 'in particular' seems to point to the superiority of written over verbal statements.

Clause 8. Statements against interest.—The ground of reception of such statements is the presumption that what a man states against his interest is generally true. Experience tells us that self-interest induces men to be cautious in saying anything against themselves and when one makes a declaration in disparagement of his own rights or interest, it is generally true and because it is so, the law has deemed it safe to admit evidence of such declarations. The ordinary tests of truth afforded by the administration of an oath and by cross-examination are, no doubt, wanting here; but their place is, in some measure, supplied by the circumstances of the declarant and the character of his statement.

The interest to which the statement must be opposed in order to be relevant, may be one of the following four :—
 (1) Pecuniary. (2) Proprietary. (3) Interest in escaping a criminal prosecution. (4) Interest in escaping a suit for damages.

This clause comprises four classes of declarations against interest.

A statement by a landlord who is dead, that there was a tenant on the land, is a statement against his proprietary interest and admissible under this clause. (31 Cal 965).

Clause (3) of sec. 32 extends the rule as accepted in English Courts. For while in the latter the interest involved must be either *pecuniary*, or proprietary, no other kind being sufficient, under the Evidence Act, the statement is admissible also when, if true, it would expose or would have exposed the declarant to a criminal prosecution or to a suit for damages. (W. & A.).

The statement of an accused person, who is dead, implicating himself and an accomplice in a crime, is admissible.

Statement exposing to

criminal
prosecution.

under S. 32 (3) as a statement, which exposes him to a criminal prosecution (5 Cr. L. J. 300). Under the English law, however, such statement is not admissible. In the *Sussex Peerage case*, Lord Brougham remarked : "To say, if a man should confess a felony for which he would be liable to prosecution, that therefore the instant the grave closes over him, all that was said by him is to be taken as evidence in every action and prosecution against another person, is one of the most monstrous and untenable propositions that can be advanced."

Declaration
against
interest
should to be
admissible,
have been
against
interest at the
time when
they were
made.

"**Would have exposed him**"—The words 'would have exposed him' mean 'would have exposed him *at the time that the statement was made*.' "It could never have been intended that a statement made after the risk had passed away, as, for example, after a suit for damages had become barred by limitation or after the expiry of the two years within which prosecutions for offences under the Indian Christian Marriage Act must be instituted (*see* sec. 76, Act XV of 1872), should be admitted merely because if made some months or weeks earlier it would have exposed the person making the statement to a criminal prosecution or to a civil suit for damages. This view has since been supported by the Calcutta High Court and is generally adopted by modern authorities." (Field's Evidence, 136).

Hearsay evi-
dence respec-
ting public
right or
custom etc.
Grounds of
admission :—
(1) Necessity,
ancient facts
being
generally in-
capable of
direct proof.
(2) The
guarantee of

Clause 4 : Statements giving opinion as to public right or custom or matter of public or general interest—The admissibility of the declarations of deceased persons respecting public rights or customs of public or general interest is sanctioned because these rights or customs are usually of so undefined and general a character, that direct proof of their nature and existence can seldom be obtained and ought not to be required. In matters in which the community are interested; all persons must be deemed conversant. As common rights are naturally talked of in public and as the nature of such rights excludes

the possibility of individual bias, what is dropped in conversations respecting them may be presumed to be true. For, the general interest which belongs to the subject would lead to immediate contradiction from others, if the statements proved were false. Reputation can hardly exist without the concurrence of many parties unconnected with each other, who are all alike interested in investigating the subject. Such concurrence furnishes strong presumptive evidence of truth. Now it is obvious that rights of public or general interest which are supposed to have been exercised in times past, partake in some degree of the nature of historical facts; and especially in this, that it is rarely possible to obtain original proof of them. The law accordingly allows them to be proved by general reputation, *e. g.*, by declarations of deceased persons who may be presumed to have had competent knowledge on the subject. But in order to guard against fraud, it is an established principle that such declarations must have been made *ante litem motam i. e.*, before any controversy had arisen on the subject to which the declarations relate.

truth afforded by the public nature of the rights or customs etc. which tend to preclude individual bias and to render mis-statements difficult by exposing them to constant contradiction.

Essentials.—To render a statement admissible under this clause, three conditions must be fulfilled :—

(1) The statement must relate to the opinion of any person (who is dead or cannot be found etc.) as to the existence of any public right or custom or matter of public or general interest ;

(2) the person who made the statement must be likely to be aware of the existence of such right or custom or matter if it existed ; and

(3) the statement must have been made *ante litem motam i. e.*, before any controversy as to such right or custom or matter had arisen.

In what cases and under what conditions is a verbal statement of opinion by a deceased person admissible as relevant to prove an allegation of a public right or custom ?

All 1917.

'Matters of public or general interest'—The term 'public' applies to that which concerns every member of the State or community. The term 'general' is limited to a lesser,

though still a considerable, portion of the community, as for examples, to the persons living in a particular district or neighbourhood.

"Of the existence of which, if it existed, he would have been likely to be aware"—The right or custom or matter referred to in this clause must have been one of whose existence the declarant should be aware. Declarations respecting such matters are deemed to be relevant only when they were made by persons who are shown to the satisfaction of the Judge, or who appear from the circumstances of their statement, to have had competent means of knowledge. If the declaration is made otherwise than upon the declarant's own knowledge, it will be rejected.

"Before any controversy had arisen"—The declarations must have been made *ante litem motam* i. e., before the commencement of any controversy, legal or otherwise, touching the matter to which they relate. The risk that an opinion expressed after the controversy arose may be an interested or prejudicial opinion, is the ground for excluding it.

Clause 5 :—Statement as to existence of relationship—Under this clause statements made by deceased persons are relevant when they relate to the existence of any relationship between persons, alive or dead, as to whose relationship the person making the statement had special means of knowledge and when the statement was made before the question in dispute was raised. For the above purpose and to the extent mentioned above, statements of deceased relations and servants and dependents of the family are admissible.

The grounds upon which the admissibility of this class of statements rests are :—(1), *necessity*, such inquiries generally involving remote facts of family history known to but few

and incapable of direct proof : and (2) the special means of knowledge possessed by the declarant.

English law—The law of India regarding the admissibility of the statements of deceased persons relating to the existence of any relationship by blood, marriage or adoption, is different from the law of England, for whereas, under the English law, a certain degree of relationship is necessary in order to make such statements admissible the Evidence Act merely requires that the declarant should have special means of knowledge of the relationship to which the statement relates and that the statement was made before the question in dispute was raised. Further, according to English law declarations made *ante litem motam* by deceased relatives respecting matters of pedigree are relevant only in cases in which the pedigree to which they relate is *in issue*, but not to cases in which it is only *relevant* to the issue. But under this Act the declarations are admissible on any issue provided they relate to a fact relevant to the case. (W. & A)

Admissibility of hearsay evidence regarding relationship under I. E. Act.—For the purposes of the Indian Courts, the extent to which hearsay evidence with regard to relationship is admissible may be summarized shortly under three heads :—

(1) Statements made orally or in writing as to the existence of relationship between persons living or dead, by persons who are dead etc. having special knowledge *ante litem motam* (Cl. 5, S. 32).

(2) Statements in writing, as to relationship between persons deceased, in wills or deeds relating to the affairs of the family to which they belonged etc. made *ante litem motam* by persons who are dead etc. (Cl. 6, S. 32).

(3) Opinion shewn by conduct as to the existence of a relationship by a person who had special means of knowledge (S. 50).

Clauses 5 and 6 which are exemplified by ill. (i) and ill. (j) and (m) respectively. together with S. 50 deal with the relevancy of certain facts which are treated by English text-writers under the single head of 'matters of pedigree.' There are, however, important differences between the English law and the Indian law on the subject (W. & A).

The question is, whether A is a chela (disciple) of a deceased Mohant B. A produces in support of his statement a will executed by B wherein the latter stated that A and none else was his chela. Discuss the admissibility of the will in evidence.
C.U. 1931(a).

Clause 6. Statement as to relationship in a will or deed.—Under this clause statements relating to the existence of relationship between deceased persons made before the question in dispute was raised are admissible where they are contained in a will or deed or in family pedigree or upon a tombstone. Unlike clause (5), this clause does not deal with the question by whom the statement is to be made nor does it require that it should have been made by a person who had special means of knowledge, possibly on the ground that it is improbable that any person would insert in a solemn deed or will etc., any matter the truth of which he did not know or had not satisfactorily ascertained. (W & A).

Difference between clauses (5) and (6).—The differences between clause 5 and clause 6 are the following :—

(1) Clause 5 refers to relationship between *any* persons. *living* or *dead*, whereas clause 6 refers to relationship between *deceased* persons only. This last clause does not, therefore, embrace the case of a statement of relationship between a deceased person and a living person.

(2) Clause 5 imposes the restriction that the person making the statement should have special means of knowledge, whereas clause 6 imposes no such restriction but enjoins that the statement must be contained in a will or deed etc.

(3) In clause 5 the evidence is the declaration of the persons deceased or otherwise unproducible, whereas in clause 6 the evidence is that of *things* such as genealogical trees, tombstone etc.

In both the clauses, however, there is one point of

similarity *vis.*, that they both refer to pedigree and the statements under either clause, in order to be relevant must have been made *ante litem motam i. e.*, before the question in dispute was raised. •

Clause 7: Statements in documents relating to transactions mentioned in sec. 13 (a).—Statements contained in any deed, will or other document as is mentioned in sec. 13, clause (a) *i.e.* any transaction by which any right or custom was created, claimed, modified, recognised, asserted or denied or which was inconsistent with its existence may be proved under this clause. Sec. 13 should be read together with this clause and they both relate to *private* as well as to *public* rights and customs.

English law.—Under this clause the word “right” includes both *public* and *private* rights. But under the English law declarations, written or verbal, made by deceased persons are admissible only in proof of rights of a *public* or *general* nature; and to prove rights strictly *private* such evidence is not generally receivable.

Difference between Cl. (4) & Cl. (7).—Cl. 7 speaks of both *public* and *private* rights and as such differs from Cl. 4, which relates to statements concerning *public* or *general* rights only. Again Cl. 4 admits the *verbal* or *written* statement giving the opinion of some particular person as to the existence of such rights, whereas under this clause (*i.e.* Cl. 7) the statement in order to be admissible must be one contained in a *document*.

Clause 8: Statements made by a number of persons expressing feelings or impressions.—The meaning of this clause is that when a number of persons assemble together to give vent to one common statement, which statement expresses the feelings or impressions made in their minds at the time of making it, that statement may be repeated by the witnesses, and is evidence (234 P. R. Cr. 35). Thus the evidence that a plaintiff was publicly laughed

at in consequence of a libel was admitted to prove that the libel referred to the plaintiff. (4 M. & P. 99).

The relevancy of *individual* feelings and opinions is dealt with by Ss. 14 and 45-51. This clause relates to statements expressing feelings or impressions not of an individual but of an aggregate of individuals, as the exclamations of a crowd and the evidence is receivable on account of the difficulty or impossibility of procuring the attendance of all the individuals who compose such crowd or aggregate of persons.

Under what circumstances is a deposition of an absent witness admissible? Bom, 1898. Where and under what circumstances is evidence given by a witness in a judicial proceeding relevant for the purpose of proving in a subsequent judicial proceeding the truth of the facts stated in his former deposition? All. 1915.

2. Relevancy of previous deposition—Evidence given by a witness in a judicial proceeding, or before any person authorized by law to take it, is relevant for the purpose of proving in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding the truth of the facts which it states when the witness is dead or cannot be found or is incapable of giving evidence or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount delay or expense which, under the circumstances of the case, the Court considers unreasonable.*

Provided—(1) that the proceeding was between the same parties or their representatives in interest, (2) that the adverse party in the first proceeding had the right and opportunity to cross-examine; and (3) that the questions in issue were substantially the same in the first as in the second proceeding. (S. 33).

Note.—This section enumerates the cases in which the evidence given by a witness in a judicial proceeding or before any person authorized by law to take it, *e.g.* an

* These conditions are the same as those enumerated in S. 32 with the exception that S. 33 adds the case of the witness being kept out of way by the adverse party.



arbitrator, a coroner etc. is relevant for the purpose of proving (a) in an entirely new judicial proceeding or (b) in a subsequent stage of the same proceeding, the truth of the facts which it states. This section also forms an exception to the rule against hearsay. The principle which sanctions the admissibility of such evidence is the simple principle of *necessity*—that is, want of any other means of utilising the knowledge of the witness.

Evidence given in a judicial proceeding by a witness is admissible, as evidence in a subsequent judicial proceeding or at a later stage of the same judicial proceeding only in the following emergencies :—(i) when the witness is dead ; (ii) when he cannot be found ; (iii) when he is incapable of giving evidence ; (iv) when he is kept out of the way by the adverse party and (v) when his presence cannot be obtained without an amount of delay or expense, which under the circumstances of the case, the Court considers unreasonable. As the exclusion of such evidence would in many cases result in serious miscarriage of justice, it has been thought advisable to receive it in the emergencies mentioned above *provided* (1) that the proceeding was between the same parties or their representatives in interest ; (2) that the adverse party in the first proceeding had the right and opportunity to cross-examine and (3) that the questions in issue were substantially the same in the first as in the second proceeding. The admission of such evidence is said to be based on the consideration that the parties and the issue being the same and full opportunity of cross-examination having been allowed, the second trial is virtually a continuation of the first. The grounds of admissibility in the present section depends not, as in the case of the preceding section, upon the character of the statement and the subject to which it refers but on the *circumstances under which it was made* and these circum-

stances (which must be shown in order to render the evidence admissible) are :—

Essentials.

- | | | |
|---------------------------------|---|---|
| 1. That the evidence was given— | { | <ul style="list-style-type: none"> (a) in a judicial proceeding ; or (b) before any person authorised by law to take it, <i>e. g.</i> an arbitrator, a coroner etc.* |
| 2. That the witness— | { | <ul style="list-style-type: none"> (a) is dead ; or (b) cannot be found, or (c) is incapable of giving evidence ; or (d) is kept out of the way by the adverse party ; or * (e) cannot be procured without an amount of delay or expense which the court considers unreasonable. |

3. (a) That the previous suit wherein the deposition was given was between the same parties or their representative in interest ;

(b) that the adverse party in the first proceeding had the right and opportunity to cross-examine, and

(c) that the questions in issue were substantially the same in the first as in the second proceeding.

Burden of proof.

The burden of proving the circumstances which render such evidence admissible, lies on the person who wishes to give the evidence (S. 14). When evidence given on previous occasions is admissible, it may be proved by the production of the record or a certified copy. (S. 76) Sec. 80 *infra* provides that a document purporting to be a record of evidence shall be presumed to be genuine ; that statement made as to the circumstances under which it was taken shall be presumed to be true, and the evidence to have been duly taken.

* The evidence given in the previous proceeding must have been given on oath or solemn affirmation and should also have been recorded in the manner prescribed by law.

When the witness is dead or cannot be found etc.—These expressions have been used in this section in the same sense as in S. 32 and they have been fully explained in notes to S. 32.

Kept out of the way—The rule that if a witness be kept out of the way by the adverse party, his evidence given in a former judicial proceeding will be admissible in a later stage of the same judicial proceeding or in a subsequent judicial proceeding, rests on the broad principle of justice which will not permit a party to take advantage of his own wrong.

Proceeding between the same parties—The two suits must be brought by or against the same parties or their representatives in interest, at the time when the suits are proceeding and the evidence is given. (12 Cal. 627).

A criminal trial or enquiry shall be deemed to be a proceeding between the prosecutor and the accused within the meaning of this section. (Expl. to S. 33).

[The effect of this explanation is that the deposition taken in a criminal proceeding may be used in a civil proceeding and *vice versa*. This explanation is intended to do away with the objection which may arise, when the depositions are taken in criminal cases that they cannot be used in a civil proceeding for want of mutuality because the Crown is the prosecutor in all criminal proceedings.]

Adverse party has the right and opportunity to cross-examine—It is certainly the right of every litigant, unless he waives it, to have the opportunity of cross-examining witnesses whose testimony is to be used against him : it follows therefore that evidence given when the party never had the opportunity to cross-examine is not legally admissible as evidence for or against him unless he consents that it should be so used. It is not necessary that the opponent should have exercised his right of cross-examination, for the depositions will be relevant if he deli-

berately forebore, or waived the absence of an opportunity for cross-examination.

The question in issue must be substantially the same in two proceedings :—The principle involved in requiring identity of the matter in issue is to secure that in the former proceeding the parties were not without the opportunity to examine and cross-examine on the very point upon which their evidence is adduced in the subsequent proceeding.

Relevancy
of statements
made under
special
circumstances,

3. Statements made under special circumstances.—Sections 34-38 constitute the third class of exceptions to the rule against hearsay. They make provision for the admissibility of two classes of statements *e.g.* (1) entries in books of account regularly kept in the course of business ; (2) entries in public documents or in documents of a public character. Both classes of statements are relevant, whether the person who made them is or is not called as a witness and whether he is or is not a party to the suit and are admissible owing to their special character and the circumstances under which they are made which in themselves afford a guarantee for their truth.

Secs. 34-36 lay down the following rules :—

Entries in
books of
account
regularly kept
in the course
of business .
when relevant.
What are the
conditions
under which
an entry in an
official book
or register
stating fact in
issue becomes
a relevant
fact ?

1. Entries in books of account :—Entries in books of account, regularly kept in the course of business, are relevant whenever they refer to a matter into which the court has to enquire, but such statements shall not alone be sufficient evidence to charge any person with any liability. (S. 34),

Illustration—A sues B for Rs. 1,000, and shows entries in his account-books showing B to be indebted to him to this amount. The entries are relevant, but are not sufficient, without other evidence, to prove the debt.

Principle—The principle underlying this section is based on the following considerations :—(a) The habit and

system of making such books with regularity, ensures their accuracy. (b) The influence of habit prevents casual inaccuracy, and counteracts the casual temptation to mis-statements. (c) As such books record a regular process of business-transactions, an error is almost certain to be detected and rectified. (d) In such books mis-statements cannot be made except by a systematic and comprehensive plan of falsification. (e) In some cases the entrant may make the record under a duty to an employer in which case there is the additional risk for censure from the employer, in case of the entrant committing any mistake. (Wigmore).

What is the evidentiary value of an entry in a man's account book in support of his claim?
C. U. 1907, Are entries in books of account alone sufficient to charge any persons with liability?
When do they require corroboration as a matter of law and when not?

Regularly kept in the course of business.—The section requires that entries in accounts should in order to be relevant, be regularly kept in the course of business. It is essential in every case, where reliance is placed upon books of account, to establish that they have been regularly kept in the course of business. If books are kept in pursuance of some continuous and uniform practice in the current routine of the business of the particular person to whom they belong, they are books regularly kept in the course of business, within the meaning of this section.

An account to be regularly kept within the meaning of this section need not have been written up from day to day or from hour to hour as the transactions have taken place. The time of making the entries may affect the value of them but should not, if they have been made regularly in the course of business afterwards, make them irrelevant. (27 Cal. 118).

Such statement shall not alone be sufficient.—

The entries alluded to in S. 34 being the acts of the party himself must be received with caution. They are subject to the restriction that they shall not alone be sufficient evidence to charge any one with liability without some independent evidence of the fact stated in them. One party, by merely producing his own books of account cannot bind the other.

Distinction between entries under this section & Sec. 32, Cl. (2)—Entries in accounts relevant only under sec. 34 are not alone sufficient to charge any person with liability ; corroboration is required. But where accounts are relevant also under S. 32 (2) they are in law sufficient evidence in themselves and the law does not, as in the case of accounts admissible only under S. 34, require corroboration. Entries in account may be, in the same suit, relevant under both sections and where that is so, it is clear that in as much as they are relevant under S. 32 (2), the necessity of corroboration prescribed by S. 34 does not arise.

Relevancy of entry in public record made in performance of duty. The question is as to the date of A's birth. Is the recital of the date of birth in orders for appointment and discharge of guardian admissible in evidence ?
C. U. 1924(a)

2. Entry in public record made in performance of duty,—An entry in any public or other official book, register or record stating a fact in issue or relevant fact, and made by a public servant, in the discharge of his official duty, or by any other person in performance of a duty specially enjoined by the law of the country in which such book, register or record is kept, is itself a relevant fact. (S. 35).

Principle—Documentary evidence of a public nature and of public authority are generally admissible in evidence, although their authenticity be not confirmed by the usual and ordinary tests of truth, the obligation of an oath and the power of cross-examining the parties on whose authority the truth of the documents depends. The extraordinary degree of confidence, that is reposed in such documents, is founded principally upon the circumstance that they have been made by authorised and accredited agents appointed for the purpose and also partly on the publicity of the subject matter to which they relate and in some instance upon antiquity. (Best)

Two classes of entries are contemplated by this section :—
(1) entries by public servants : (2) entries by persons other

than public servants. In the case of the latter the duty must be specially enjoined by the law of the country; in the case of the former, it is sufficient that they have been made in the discharge of official duty, but in either case, the entry must have been made by a person whose duty it was to make them.

Essentials : To render a document admissible under this section, three conditions must be satisfied :—

(1) The entry that is relied upon must be one in any public or other official book, register or record.*

(2) It must be an entry stating a fact in issue or a relevant fact.

(3) It must be made by a public servant in the discharge of his official duty or by another person in performance of a duty especially enjoined by the law.

English Law : In England, entries in registers and public books, to be admissible must have been made, *promptly* or at least without such long delay as to impair their credibility and in the manner, if any, required by law. No such restriction is provided for by this Act.

Public or other official book, register or record—
Sec. 74 *infra* specifies what "public document" are.

3. Statements in maps, charts and plans—
Statements of facts in issue or relevant facts, made in published maps or charts generally offered for public sale, or in maps or plans made under the authority of Government as to matters usually represented or stated in such maps, charts or plans, are themselves relevant facts. (S. 36).

Note.—This section mentions two classes of maps or charts, *viz.* (1) published maps or charts, generally offered

Relevancy of statements in maps or charts offered

* Sec. 35 does not apply to ordinary correspondence though that correspondence might be conducted by officials; for the entries must be in something which is either "a book, register or record" and they must be made by public servants in the discharge of their official duties. (5 Ind. Cas. 327).

for public sale or in maps or plans made under the authority of Government. In what cases are statements in maps, charts, and plans relevant under S. 36 of the evidence Act ?

C. U. 1911 (a) State briefly the provision of the Evidence Act with reference to maps plans or charts.
C. U. 1903.

Relevancy of statement as to fact of public nature contained in Acts or Notifications.

for public sale ; (2) maps or plans made under the authority of Government. The admissibility of the first class depends on the ground that the publication being accessible to the whole community and open to the criticism of all the probabilities are in favour of any inaccuracy being challenged and exposed ; and of the second class, on the ground that, being made and published under the authority of Government, they must be taken to have been made by, and to be the result of the study or enquires of, competent persons. (W. & A.).

Maps, charts or plans made for a *particular* purpose even under the authority of Government are not admissible in evidence. It must appear that they were made for the purpose of the public making use of them. (5 Cal. 287). Neither this section nor S. 83 has any application to maps prepared for *private* purposes, that is, for the purpose of any particular suit or by any Government officer for any special purpose. (23 Cal. 335).

4. Statement as to fact of public nature contained in Acts and Notifications—When the court has to form an opinion as to the existence of any fact of a public nature, any statement of it, made in a recital contained in any Act of Parliament, or in any Act of the Governor-General of India in Council or of the Governor in Council of Madras or Bombay, or of the Lieutenant Governor in Council of Bengal, or in a notification of the Government appearing in the Gazette of India, or in the Gazette of any Local Government or in any printed paper purporting to be the London Gazette or the Government Gazette of any colony or possession of the Queen is a relevant fact. (S. 37).

Note—This section applies also to any Act of the Lieutenant-Governor in Council of the North-Western Provinces and Oudh, the Punjab or Burma.

5. Statements as to any law contained in law books.—When the court has to form an opinion as to a law of any country, any statement of such law contained in a book purporting to be printed or published under the authority of the Government of such country and to contain any such law, and report of a ruling of the courts of such country contained in a book purporting to be a report of such rulings, is relevant. (S. 38).

Statement of the law of any country contained in a book printed or published under the authority of the Government of that country or published reports of the rulings of the courts of such country.

Note.—The words “any country” include India, England and foreign countries

Under this section not only books of law published under the authority of Government are relevant, but reports of the rulings of the courts are also relevant. The words “any report of a ruling of the courts etc.” seem to include unauthorized reports (such as C. W. N., C. L. J. etc.) not published under the authority of Government.

This section is to be read with S. 84 *infra* in which there is a presumption in favour of the genuineness of the books relevant under this section.

6. How much of a statement is to be proved.—When any statement of which evidence is given forms part of a longer statement, or of a conversation or part of an isolated document, or is contained in a document which forms part of a book, or of a connected series of letters or papers, evidence shall be given of so much and no more of the statement, conversation, document, book or series of letters or papers as the court considers necessary in that particular case to the full understanding of the nature and effect of the statement, and of the circumstances under which it was made (S. 39).

What evidence to be given when statement forms part of conversation, document, book or series of letters or papers.

Note.—When the evidence to be given forms part of a statement, conversation, document, book or series of letters or papers, so much of the statement etc., as the court

considers necessary to the full understanding of the nature and effect of the statement, shall only be given. The rule laid down in this section is based upon principles of justice and convenience and is also intended to avoid unnecessary delay and waste of time. While on the one hand, in the case of a statement in a civil or criminal proceeding by way of admission or confession, the *whole* of it must be taken and read together since thus alone can the whole of that which the person making the statement intended to convey be certainly arrived at; and since it would be obviously unfair to take that only which is against the interest of the declarant, while the very next sentence might contain a material qualification, on the other hand, great prolixity, waste of time and not seldom injustice, might occur if evidence of matters often otherwise inadmissible, were allowed to be given simply on the ground that the *whole* of the document or conversation must be before the Court. The latter is therefore constituted the judge of the amount which may given in evidence of any document or conversation. The discretion is to be guided by the principle of letting in so much and so much only, as makes clear the nature and effect of the statement and the circumstances under which it was made. *

"Res inter alios actæ are generally irrelevant." State the exceptions to this rule. Bom. 1899. Is judgment not inter parties admissible against a third party? Refer to a leading case. C. U. 1904 (a)

III Judgments of courts of justice when relevant (Ss. 40-44).—The third class of relevant facts are judgments, decrees and orders of the Courts of Law.

Transactions similar to but unconnected with the facts in issue (*Res inter alios actæ*) are, according to the general rule of relevancy, inadmissible in evidence. Inferences are not to be drawn from one transaction to another which is not specially connected with it, merely because the two resemble each other; as a matter of fact, they must be linked together by the chain of cause and effect in some assignable way before an inference may be drawn. Judgments in Courts of Justice on other occasions form, however, in

certain cases, an exception to the exclusion of evidence of transactions not specifically connected with facts in issue. These are dealt with in Sections 40-44 which lay down the following rules :—

1. The existence of any judgment, order or decree which by law prevents any court from taking cognizance of a suit or holding a trial is a relevant fact when the question is whether such court ought to take cognizance of such suit or to hold such trial. (S. 40).

Note—This section provides that the existence of a judgment, decree or order, is a relevant fact, if it, by law, (civil or criminal) has the effect of preventing any court from taking cognizance of a suit or holding a trial.* This section simply declares that, in cases in which the law of procedure (civil or criminal), gives to a judgment or order the effect of precluding the court from taking cognizance of or trying a subsequent cause, the existence of the judgment or order shall be a relevant fact. Thus a party to a suit can, in order to plead that the suit or trial is barred by the existence of a previous judgment or decree or a previous conviction or acquittal, produce the said judgment or decree or order in evidence and the same is relevant.

This section refers to judgments *inter partes*. It is necessary that the previous judgment or decree must be between the same parties or those through whom the parties in the subsequent suit claim. A judgment of a court of competent jurisdiction binds only the parties and their privies and not strangers to the suits, on the basis of the maxim "*Res inter alios acta et judicata alteri non tenent*," a matter transacted between one set of persons ought

[See *Gujral v. Patel*, 6 Cal. 171, and p. 83 *et seq supra*.]
Relevancy of previous judgment etc. Under what circumstances are former judgments and decrees admissible in subsequent suits or proceedings? Bom. 1914 (a) Discuss the principles according to which judgments *inter partes* are admissible under the Evidence Act, Bom. 1913 (b) How far, under what circumstances and for what purposes can previous judgments, orders and decrees be deemed relevant? What difference is there regarding such relevancy as the judgment

* The conditions under which a judgment etc. will prevent any court from taking cognizance of a suit or holding a trial are contained in Secs. 10-13 and Order 11, R. 2 of the Civil Procedure Code and in Secs. 403 and 501 of the Criminal Procedure Code.

etc. is or is not between the same parties?

C. U. 1906, Relevancy of certain judgment in probate etc. jurisdiction. How far are judgments not *inter parte* admissible in evidence?

Bom. 1912(b), C.U. 1919(b). State and illustrate the rule as to the relevancy of judgments *in rem* embodied in S. 41 of the I. E. Act, C.U. 1914(b), 1919 (a). What do you understand by the expression "judgment *in rem*"?

State the rule laid down in sec. 41 of the Evidence Act as to the relevancy of judgment *in rem*. Give an illustration. C.U. 1919(a). What are judgments which alone are to have a conclusive character?

C.U. 1905(a).

not to injure or affect another person, except in cases of judgments *in rem* and judgments relating to matters of a public nature (Ss. 41 & 42); for it is unjust that a man should be affected, and still more that he should be bound, by proceedings in which he could not make a defence, cross-examination or appeal.

2. (1) A final judgment, order or decree of a competent court, in the exercise of (a) probate, (b) matrimonial, (c) admiralty or (d) insolvency jurisdiction—

(i) which confers upon or takes away from any person any legal character or

(ii) which declares any person—

(a) to be entitled to any such character or

(b) to be entitled to any specific thing not as against any specified person but absolutely,

is relevant when the existence of any such legal character or the title of any such person to any thing is relevant.

(2) Such judgment, order or decree is *conclusive* proof—

(i) that any legal character which it confers accrued at the time when such judgment, order or decree came into operation;

(ii) that any legal character, to which it declares any such person to be entitled, accrued to that person at the time when such judgment, order or decree, declares it to have accrued to that person;

(iii) that any legal character which it takes away from any such person ceased at the time from which such judgment order or decree, declared that it had ceased or should cease; and,

(iv) that anything to which it declares any person to be so entitled was the property of that person at the time from which such judgment, order or decree, declares that it had been or should be his property. (S. 41).

Note.—This section deals with what are usually called judgments *in rem* i.e., judgments which are conclusive not only against the parties to them but also against all the world. A judgment *in personam* is the ordinary judgment between parties in cases of contract, tort or crime. It is no proof of the truth either of the decision or of its grounds as between strangers or a party and a stranger. A judgment *in personam* binds only the parties and their privies. S. 40 deals with judgments *in personam* while S. 41 deals with judgments *in rem*.

The general rule of law is that judgments are conclusive only against the parties and those who claim under them and the said rule is founded upon the well-known maxim of the civil law '*Res inter alios acta alteri nocere non debet*' (a matter transacted between one set of persons ought not to injure or affect another person). This rule is subject to certain exceptions which are the offspring of positive law, and the reason for the exceptions is that the nature of the proceedings by which there is a fictitious, though generally not unjust, extension of parties, renders it proper to use judgments against those not formally present parties as all the world is supposed to be a party to such a judgment: Consequently this section admits judgments which are technically called judgments *in rem* as evidence in all subsequent suits upon matter mentioned in the section and are treated as conclusive, as against all persons whatever, whether parties, privies, or strangers to the case, all facts in issue and all facts which must have been assumed true to warrant rendition of the judgment. It applies to judgments which confer

Distinguish between a "Judgment *in rem*" and a judgment *in personam*" for the purposes of the Indian Evidence Act. Discuss the admissibility of such judgments respectively in evidence C. U. 1911(b); Bom. 1893. Explain and illustrate "Judgment *inter partes*" Mad. 1918(b). What do you understand by "Judgment *in rem*"? State the rule laid down in S. 41 of the Evidence Act as to the relevancy of judgments *in rem*? Give an illustration C. U. 1925(b) Write notes on: Judgment *in rem*. Mad. 1911(a). &(b), 1918(b), 1919(b); Bom. 1917(b). Distinguish between "Judgments *in rem* and

judgments in personam" and state the law as to their relevancy. C. U. '21, (suppl). Explain :— Judgment in rem. Bom. 1917(b).

or take away a legal character or declare a person to be entitled to such character or to be entitled to any specific thing absolutely. These judgments are conclusive against all the world. (Banerjee's Ev. 158).

The present section declares that a judgment, decree or order to operate otherwise than *inter partes* must be a final judgment of a competent court in the exercise of (1) *probate* (2) *matrimonial*, (3) *admiralty*, or (4) *insolvency*, jurisdiction. Besides these, there are no other judgments of a conclusive character. Such judgments will operate *in rem* only in respect of those matters, of which they are declared to be conclusive proof. In other matters, even a judgment given in the above jurisdiction by a competent court is a judgment *in personam* and is conclusive only against the parties thereto and those who claim under them. Thus, a decree of divorce is conclusive upon all persons that the parties have been divorced and that the parties are no longer husband and wife ; but it is not conclusive, nor even *prima facie* evidence against strangers, that the cause for which the decree was pronounced existed. For instance, if a divorce between A and B were granted upon the ground of the adultery of B with C, it would be conclusive as to the divorce, but, it would not be even *prima facie* evidence against C, that he was, guilty of adultery with B, unless he were a party to the suit. (7 W. R. 338).

Is, the judgment of a court refusing probate a judgment in rem ? If so why ? If not why not ? Bom. 1914(b).

A probate granted by a competent Court is conclusive of the validity and contents of such a will and of the appointment of executor till it is revoked and no evidence can be admitted to impeach it, except in proceedings in the Probate Division for its revocation. But a decree of the Court of Probate and declaring the domicile of the testator is not, as a judgment *in rem* conclusive as to domicile, unless the declaration was essential to the grant. (*Concha v. Concha*; L. R. 11 App.Cas. 341.) Similarly where an application for probate of a will is contested, and it is alleged that the property disposed

of by the will was not the testator's or was not property over which he had a power of testamentary disposal, it is not the duty of the Court to try an issue raising this question. (19 All. 458.)

There is a conflict of decisions as to whether a judgment of a Court refusing probate is a judgment *in rem* or not. According to the Madras High Court, the judgment of a probate Court, refusing probate is as much a judgment *in rem* as one which grants probate, for it takes away from the executors named in the will their legal character of executors, and from the legatees and beneficiaries their legal character as such, and this result is final against all persons interested under the will. (19 Mad. 380 at p. 383.) According to the Bombay High Court a judgment refusing probate is not a judgment *in rem*, for the finding of a court that an attempted proof has failed is not a judgment as is contemplated by Sec. 41 I. E. Act. The only kind of negative evidence contemplated in the section is that which expressly takes away from a person the legal character which has up to that time subsisted. The judgment in the probate proceedings may, however, operate as *resjudicata* between the parties. (See 21 Bom. 563 ; 38 Bom. 309, F. B.) According to the Calcutta High Court, if such judgment is given on a decision on merits of the case, it is judgment *in rem*, otherwise not. (14C. W. N. 924.) The expression "legal character" in S. 41, when it has reference to a judgment of a court of probate, means the status of an administrator or executor and that only, though, when it has reference to a Matrimonial Court, it includes wife-hood and widow-hood, and the judgment of a Court of probate is conclusive proof that the person to whom letters or probate have been granted has been clothed with the powers and the responsibilities of the deceased and of nothing else. (U. B. R. 1910, 4th Cr. 61.) See Author's Indian Law of Succession, 3rd Ed. p. 208 et seq.]

[**Problem**—The final judgment of a Court in the exercise of its probate jurisdiction decides (1) that the will was duly executed, (2) that the testator was not a tenant for life, (3) that A was not the testator's wife, (4) that B, the executor named in the will is a lunatic, and (5) that C is an executor by implication and as such, entitled to probate: How far would this decision be regarded as a judgment *in rem*? C. U. 1918 (b). The decision is a judgment *in rem* in respect of points (1) and (5) only. See above and Sec. 59 of the Probate and Administration Act and S. 273 of the New Succession Act. *Vide* Author's Indian Law of Succession. 3rd Ed. p. 208 *et seq.*]

Relevancy of judgment etc. relating to matters of a public nature.

3. Judgments, orders or decrees are relevant if they relate to matters of a public nature relevant to the enquiry, but such judgments, orders or decrees are not conclusive proof of what they state. (S. 42.)

State in what cases if any and under what provisions of the I. E. Act, are judgments relevant, when such judgments are neither judgments *in rem* nor admissible under the rule of res judicata. What is the probative value of such judgments if admissible? Mad. 1918 (b). Discuss the question whether a

Illustration :—A sues B for trespass on his land. B alleges the existence of a public right of way over the land, which A denies. The existence of a decree in favour of the defendant, in a suit by A against C for a trespass on the same land in which C alleged the existence of the same right of way, is relevant but it is not conclusive proof that the right of way exists.

Note.—Under this section judgments relating to matters of a public nature are declared relevant, whether between the same parties or not. This section also forms an exception to the general rule that no one shall be affected or prejudiced by judgments to which he is not a party or privy. In matters of public right, however, the new party to the second proceeding as one of the public has been virtually a party to the former proceeding but the earlier judgment is not conclusive. Mr. Norton says: "There is, however, an exception to be noticed to the general rule that judgments *inter partes* are only receivable against the parties to them

and not against strangers. This occurs where the judgment is upon a subject of a public nature : such as customs, prescriptions, tolls, boundaries between parishes, counties, or manors, rights of fishery, liability to repair roads, sea-walls or the like. A judgment of this nature is even admissible against strangers though it is not conclusive as against them."

Sec. 40 admits as evidence all judgments *inter partes* which would operate as *resjudicata* in a second suit. Sec. 41 admits certain judgments *in rem* as evidence in all subsequent suits where the existence of the right is in issue whether between the same parties or not. And this section (Sec. 42) admits all judgments not as *resjudicata*, but as evidence, although they may not be between the same parties, *provided they relate to matters of a public nature relevant to the enquiry.*

*4. Judgments, orders or decrees, other than those mentioned in sections 41-42 are irrelevant, unless the existence of such judgment, order or decree is a fact in issue, or is relevant under some other provision of this Act. (S. 43.)

. *Illustrations*—(a) A and B separately sue C for a libel which reflects upon each of them. C in each case says that the matter alleged to be libellous is true and the circumstances are such that it is probably true in each case, or neither. A obtains a decree against C for damages on the ground that C failed to make out his justification. The fact is irrelevant as between B and C.

(b) A prosecutes B for adultery with C, A's wife. B denies that C is A's wife, but the Court convicts B of adultery. Afterwards C is prosecuted for bigamy in marrying B during A's life-time. C says that she never was A's wife. The judgment against B is irrelevant as against C.

(c) A prosecutes B for stealing a cow from him. B is convicted. A afterwards sues C for the cow, which B had

previous judgment not between the same parties, & not being a judgment in rem and not relating to matters of a public nature is at all admissible in evidence.
C.U. 1912(b).

Judgment etc. other than those mentioned in Ss. 41-42 when relevant.
Discuss whether judgment not *inter partes* is admissible against a third party. C. U. 1927(b), 27(a).

A prosecutes B for stealing

a diamond ring from him : B is convicted, A afterwards sues C, a Marwari for the ring which B had sold to the Marwari before his conviction. A's pleader tenders in the suit the Magistrate's judgment against B but C's Counsel objects to its relevancy. How will you decide the point ? Give reason. C.U. 1914(b), [See ill. (c).]

When are judgments of courts of justice relevant ? How would you prove a judgment which was relevant ? All 1916. [Judgments are to be proved by certified copies. See Sec. 77, *infra*.]

sold to him before his conviction. As between A and C. the judgment against B is irrelevant.

(d) A has obtained a decree for the possession of land against B. C, B's son murders A in consequence. The existence of the judgment is relevant, as showing motive for a crime.

(e) A is charged with theft and with having been previously convicted of theft. The previous conviction is relevant as a fact in issue.

(f) A is tried for the murder of B. The fact that B prosecuted A for libel and that A was convicted and sentenced is relevant under Sec. 8 as showing the motive for the fact in issue.

Note.—This section declares that all judgments, or orders or decrees other than those specified in Secs. 40-41 are themselves irrelevant *i. e.*, not admissible in evidence unless (1) their existence is a fact in issue or (2) they are relevant under some other section of this Act. In other words, if a judgment is not relevant under any of the above sections (40-42), it may still be relevant (i) if the existence of that judgment is itself a fact in issue or (ii) if that judgment is relevant under any other section of this Act.

'Relevant under some other provisions of the Act.'—These words indicate that there are some other provisions in this Act, under which judgments etc. not *inter partes* are relevant ; for instance, under Ss. 8, 11, 13 and 54, Expl. (2), judgments not *inter partes* are relevant. Ills (d), (e) and (f) are instances of judgments being relevant otherwise than under Ss. 40-42.

To sum up :—The following rules may be deduced from the provisions of Secs. 40-43 :—

(1) Judgments, orders or decrees are relevant under S. 40, if they operate as *res judicata*. (2) Judgments etc. are relevant under S. 41, if they are judgments *in rem*. (3) Judgments, etc. are relevant under S. 42 if they relate

to matters of public nature. (4) Judgments etc. are relevant under S. 43, if the existence of such judgments etc. is a fact in issue or if such judgments etc. are admissible under any other provisions of this Act, such as S. 8, 11 or 13.

5. Any party to a suit or other proceeding may show that any judgment, order or decree which is relevant under section 40, 41 or 42 and which has been proved by the adverse party was delivered by a court not competent to deliver it or was obtained by fraud or collusion. (S. 44).

Impeachment
of judgment
evidence.

Note.—This section lays down that when one of the parties to a suit or other proceeding, tenders or has put in evidence, a judgment, order, or decree under Ss. 40-42, it is open under this section, to the party against whom it is offered, to avoid its effect on any of the grounds mentioned in this section *viz.* (1) that the court delivering such judgment, order or decree had no jurisdiction. or (2) that the judgment etc. was obtained by fraud or collusion. In England such a defence can be taken only by a stranger to the suit in which the judgment was given. See p. 9 *ante*.

When are
judgments of
Court of Jus-
tice relevant ?
How can such
judgments be
avoided ?
What is the
difference
between
English and
Indian Law
on this point
Mad. 1921(a)?

[**Problem :** A, as executor to the estate of X, by virtue of his last will and testament, has brought a suit against B for recovery of damages for trespass on land belonging to the estate of X. B denies that A is executor of X's will, and avers that there is a public right of way over the land in suit, and that it does not belong to the estate of X. In this suit, A produces—(a) an order of the District Judge concerned appointing A executor of X's last will and testament; and (b) a judgment in favour of X in a suit which X brought in his life-time against C for alleged trespass on the same land, and in which C pleaded the existence of a public right of way over it. And B produces a judgment dismissing a suit which D had brought against Y for recovery of possession of the same land, on the allegation that Y had wrongfully dispossessed him (D) of the land. Are

these judgments, or any of them and the order appointing A executor of X's will, relevant to the suit brought by A against B? If so, which of them, and why? C. U. 1918 (a). The order appointing A executor of X's will is admissible under S. 41 and the judgment obtained by X against C is admissible under S. 42. But the judgment produced by B is not admissible. See above.]

As a general rule, witnesses must speak to facts within their knowledge; their opinion or beliefs are not admissible. Sections 45-41 are exceptions to this general rule,

IV. Opinions of third persons when relevant.—

The fourth class of relevant facts are opinions formed by third persons as to the facts in issue or relevant facts. The opinions of any persons, other than the Judge by whom the fact is to be decided as to the existence of facts in issue or relevant facts are, as a rule, irrelevant to the decisions of the cases to which they relate, for the most obvious reasons. To show that such and such a person thought that a crime had been committed or a contract made would either be to show nothing at all or it would invest the person whose opinion was proved, with the character of a judge. The use of witnesses being to inform the tribunal respecting facts within their knowledge, their opinions, or beliefs are not in general receivable as evidence. In some few cases, the reason for which are self-evident, it is otherwise. They are specified in Sections 45-51*, which lay down the following rules :—

Enumerate the circumstances under which expert opinion is relevant, and state how such opinion may be ascertained? How is a fact in reference to such opinion relevant when it is not other-

1. Opinion of experts.—When the Court has to form an opinion upon a point of foreign law, or of science or art or as to identity, of hand-writing or finger-impression, the opinions upon that point

* A distinction must, however, be drawn between the cases where an opinion may be admissible under Secs. 6-11 (independently of its correctness as such) as forming a link in the chain of relevant facts to be proved and those in which an opinion is tendered merely as such and is sought to be made use of by reason of the correctness of its finding upon its subject-matter. In the last mentioned cases, the opinions will be excluded, unless it be one of those which are permitted to be given as evidence under sections 45-51.

of persons specially skilled in such foreign law, science or art or in questions as to identity of hand-writing or finger impression are relevant facts. Such persons are called experts. (S. 45). wise relevant?
C.U. 1910(b).

Illustrations—(a) The question is, whether the death of A was caused by poison. The opinions of experts as to the symptoms produced by the poison by which A is supposed to have died, are relevant.

(b) The question is, whether A, at the time of doing a certain act was by reason of unsoundness of mind, incapable of knowing the nature of the act or that he was doing what was either wrong or contrary to law. The opinion of experts upon the question whether the symptoms exhibited by A commonly shew unsoundness of mind, and whether such unsoundness of mind, usually renders persons incapable of knowing the nature of the acts which they do, or of knowing that what they do is either wrong or contrary to law, are relevant. State briefly
the provisions
of the Evi-
dence Act
with reference
to finger im-
pression.
C.U. 1903.

(c) The question is, whether a certain document was written by A. Another document is produced which is proved or admitted to have been written by A. The opinions of experts on the question whether the two documents were written by the same person or by different persons are relevant. In what cases
are opinions
of third per-
sons relevant?
Punj. 1917.

Note.—Sec. 45 forms an exception to the rule as regards the exclusion of opinion evidence. This section makes opinions of experts admissible on (1) point of foreign law, (2) point of science, (3) point of art, (4) identity of hand-writing and (5) finger-impression.

The use of witnesses being to inform the tribunal respecting facts, their opinions are not in general receivable as evidence. Facts should be stated, and not inferences. The rule, however, is not without its exceptions. Being based on the presumption that the tribunal is as capable of forming a judgment on the facts as the witnesses, when circumstances Are "opi-
nions" of
people "facts"
as defined in
the Evidence
Act and are
they in any
case relevant?
C.U. 1911(a).
When are the
opinions of
persons who
are strangers
to a proceed-
ing relevant

under the Evidence Act?
 What is the probative value of such evidence?
 Bom. 1914(a), 1908 (b).
 Define :—
 Expert
 All. 1915.
 Explain :—
 Expert evidence,
 Bom. 1917(a).
 What is the reason for excluding opinion evidence?
 Mad. 1912(b).
 State upon which subjects the opinions of witnesses are admissible in evidence,
 C. U. 1908.
 Is opinion ever admissible in evidence? If so, of whom, and with regard to what matters?
 C.U. 1925(b).

rebut this presumption, the rule naturally gives way, and the opinions of specially skilled persons are receivable in evidence. The foundation on which the expert testimony rests is the supposed superior knowledge or experience of the expert in relation to the subject-matter upon which he is permitted to give an opinion as evidence.

The opinion of witnesses possessing peculiar skill is admissible, whenever the subject matter of inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it without such assistance; in other words, when it so far partakes of the character of a science or art, as to require a course of previous habit or study in order to obtain a competent knowledge of its nature. On the other hand, it is equally clear that the opinion of skilled witnesses cannot be received when the enquiry relates to a subject which does not require any peculiar habits or course of study in order to qualify a man to understand it (Taylor).

An expert may refer to text books to refresh his memory or to correct or confirm his opinion. If he refer to particular passages therein as accurately representing his views, they may be received as part of his testimony though not (in England) as evidence *per se*. The opinion of an expert is open to corroboration or rebuttal and when the opinion is relevant, the grounds on which such opinion is based are also relevant,

Specially skilled persons.—The expression mean “any person who, from his circumstances and employment possesses exceptional means of knowledge, has given the subject particular consideration and is more than ordinarily conversant with its detail.”

It is the duty of the judge to decide whether the skill of any person in the matter on which evidence of his opinion offered is sufficient to entitle him to be considered as an

expert. The Judge should decide this question before he would allow opinion evidence to go in.

Proof of foreign law.—In India, a foreign law can be proved by—

(a) the production of (i) a book purporting to be printed or published under the authority of the Government of such country and purporting to contain such law or (ii) any report of a ruling of the Courts of that country (Sec. 38) ;

(b) opinion of experts *i. e.*, persons specially skilled in such foreign law (S. 45).

In England, however, laws of foreign countries can only be proved by calling professional or other official persons to give their opinion on the subject.

2. Facts bearing upon opinions of experts.—

Facts, not otherwise relevant, are relevant if they support or are inconsistent with the opinions of experts, when such opinions are relevant. (S. 46).

How is a fact in reference to expert opinion relevant when it is not otherwise relevant?
C.U. 1910(b).

Illustrations.—(a) The question is, whether A was poisoned by a certain poison. The fact that other persons, who were poisoned by that poison exhibited certain symptoms which experts affirm or deny to be symptoms of that poison is relevant.

(b) The question is, whether an obstruction to a harbour is caused by a certain sea-wall. The fact that other harbours similarly situated in other respects, but where there was no such sea-wall, began to be obstructed at about the same time is relevant.

Note.—Not only the opinions of experts, but other facts too which support or are inconsistent with the opinions of experts are relevant. This is but a round-about way of saying that the opinion of an expert is open to corroboration or rebuttal.

3. Opinion as to hand-writing.—(1) When the Court has to form an opinion as to the person by whom any document was written or signed, the

opinion of any person acquainted with the hand-writing of the person by whom it is supposed to be written or signed that it was or was not written or signed by that person is a relevant fact- (S. 47).

(2) A person is said to be acquainted with the hand-writing of another person (i) when he has seen that person write or (ii) when he has received documents purporting to be written by that person in answer to documents written by himself or under his authority and addressed to that person, or (iii) when, in the ordinary course of business, documents purporting to be written by that person have been habitually submitted to him. (Expl.).

Illustration :—The question is whether a given letter is in the handwriting of A, a merchant in London. B is a merchant in Calcutta, who has written letters addressed to A and received letters purporting to be written by him. C is B's clerk, whose duty it was to examine and file B's correspondence. D is B's broker to whom B habitually submitted the letters purporting to be written by A for the purpose of advising with him thereon. The opinions of B, C and D on the question whether the letter is in the handwriting of A are relevant, though neither B, C or D ever saw A write.

Note.—Sec. 67 enacts that if a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that person's handwriting must be proved to be in his handwriting. This section indicates one of the methods of proving handwriting.

Modes of proving handwriting.—Handwriting may be proved or disproved in the following ways :—

- (1) By calling the writer himself.
- (2) By calling any person who actually saw the person write the document.
- (3) By the evidence of the opinion of experts under

What are the various modes provided in the Indian Evidence Act for proving handwriting?
Maj. 1915.

Sec. 45 *ante*, which differs from the present one in this that under its provisions the witness would be required to be *skilled in the art* of distinguishing writing, while under present section he must be acquainted with the handwriting of the person alleged to have written the documents.

When the genuineness of a letter is in dispute what are the various kinds of evidence that may be laid before the court to prove the handwriting? Bom. 1914(b).

- (4) By the opinion evidence of non-experts namely, under the present section (S. 46) by the evidence of a person who has acquired a knowledge of the character of the handwriting in one of the ways specified in this section, [Such knowledge may be acquired—

- (a) by having at any time seen the party write or
- (b) by receipt of documents purporting to be written by the party in answer to documents written by the witness or under his authority and addressed to that party, or
- (c) by having observed, in the ordinary course of business, documents purporting to be written by the person in question]
- (5) by the Court comparing the document in question with any others proved to the satisfaction of the Court to be genuine. (S. 73).

4. Opinion as to existence of right or custom.—When the court has to form an opinion as to the existence of any general custom or right, the opinions as to the existence of such custom or right of persons who would be likely to know of its existence if it existed, are relevant (S. 48).

(2) The expression “general custom or right” includes customs or rights common to any considerable class of persons (Expl.).

For instance, the right of the villagers of a particular

village to use the water of a particular well is a general right within the meaning of the section.*

Note.—The opinions of persons, likely to know about village rights to pasturage, to use of paths, water-courses, or ferries, to collect fuel, to use tanks and bathing ghats, mercantile usages, and local customs would be relevant under this section. Upon such questions, the opinions of persons who would be likely to know of the existence of the custom or right are the best evidence. Such persons are, so to speak, the depositories of customary law, just as the text-books are the depositories of the general law.

What facts
are relevant
when any
right of cus-
tom is in
question ?
C.U. 1913(b).
'12(b),
All. 1917.

Ss. 13, 32 (4), 32 (7) and 48 compared.—Sec. 13 applies to all rights and customs, *public, general* and *private* and refers to specific facts which may be given in evidence. Sec. 32 cl. (4) refers to the reception of second-hand *opinion* evidence, in cases in which the declarant cannot be brought before the Court, upon the question of the existence of any *public* right or custom or matter of *public* or *general* interest, made *ante litem motam* and S. 32 cl. (7) refers to statements contained in certain documents. The present section deals with *opinion* evidence but refers to the evidence of a living witness produced before the Court sworn and subject to cross-examination. † The distinction between the present section and section 32 cl. (4) is this :—

(1) Sec. 32 (4) makes statement of opinions regarding public rights or customs made by persons who cannot be called relevant. The present section refers to the evidence of living witness produced before the Court.

(2) Sec. 32 (4) speaks of any *public* right or custom or

* The explanation excludes *private* rights from the operation of this section. Opinion evidence is not receivable to prove such rights; they must be proved by facts, such as acts of ownership.

† For this section, when read with sec. 60 post, requires that the person who holds the opinion should be called as a witness; the proviso to the latter section applying only in the case of experts.

matter of public or general interest ; but in this section the word "public" does not appear. It refers only to *general* rights or custom, not *public* ; the Explanation to the section adopting the sense in which the term 'general' is used by English text writers.* "It does not appear why the section does not provide for the admission of oral evidence expressing opinion as to the existence of a *public* custom or right. It may perhaps be said that every public custom or right is a general custom or right though the converse of this proposition would not hold good or that having regard to the reasons for which these terms are used by English writers the distinction between them is not of importance in this country." (W. & A).

(3) The present section further differs from clause (4) of Sec. 32 in as much as it is not governed by the limitation *ante litem motum* ("before any controversy").

Custom.—*Custom* should be distinguished from *usage*. Usage is a fact and custom is a law. There can be usage without custom but not custom without usage. Usage is inductive, based on the consent of persons in a locality. Custom is deductive, making established local usage a law. (Wharton)

5. Opinions as to usages, tenets, etc.—When the court has to form an opinion as to (a) the usages and tenets of any body of men or family, (b) the constitution and government of any religious or charitable foundation, or (c) the meaning of words or terms used in particular districts or by particular classes of people,—the opinions of persons having special means of knowledge thereon, are relevant facts (S. 49).

* A distinction has been drawn under English law between the meaning of the terms 'public' and 'general', the former being applied to that which concerns every member of the State, while the latter is limited to a lesser, though still a considerable portion of the community, as for example, to the persons living in a particular district or neighbourhood.

Note.—Under this section a witness may give his opinion upon—(1) Usages of any body of men : (Such as usages of trade, agriculture, mercantile usage and any other usage common to any body of men). (2) Tenets of any body of men—(This will include any opinion, principle, dogma or doctrine, which is held or maintained as truth. (3) Usages of a family (or kulachar, such as the custom of primogeniture for any peculiar course of descent). (4) Tenets of a family. (5) The constitution or government of any religious or charitable foundation. (6) Meaning of words or terms used in particular districts or by particular classes of people. On such questions the opinions of persons having special means of knowledge are the best evidence. This section has to be read with Ss. 51 and 60 (5). Compare this section with S. 98 *infra*.

State the exceptions to the rule that opinion evidence is not admissible. Is any kind of opinion evidence admissible to prove marriage? Mad. 1916, 1921 (b).

6. Opinion on relationship.—(1) When the Court has to form an opinion as to the relationship of one person to another, the opinion, expressed by conduct, as to the existence of such relationship, of any person who as a member of the family or otherwise, has special means of knowledge on the subject, is a relevant fact. (S. 50).

(2) But such opinion shall not be sufficient to prove a marriage in proceedings under the Indian Divorce Act or in prosecutions under Secs. 494, 495, 497 or 498 of the Indian Penal Code (Proviso).

Illustrations :—(a) The question is, whether A and B were married. The fact that they were usually received and treated by their friends as husband and wife, is relevant.

(b) The question is, whether A was the legitimate son B. The fact that A was always treated as such by members of the family, is relevant.

Note.—This section provides an exceptional way of proving a relationship. It makes admissible as evidence the mere opinion, expressed by conduct of a person, who, as

What qualification must a witness speak

a member of the family or otherwise, *has special means of knowledge* to prove the existence of a relationship. Cf. *ing as to relationship possess ? Bom. 1911(b)*
 Sec 32, cls. (5) and (6).

Opinion expressed by conduct.—As the opinion in this case is to be evidenced by the *conduct* of the witness, there is an additional guarantee for its truthfulness besides that of special knowledge of the subject.

Proviso.—Opinion on relationship is not sufficient to prove a marriage in proceedings under the Indian Divorce Act or in prosecutions for bigamy, adultery or enticing away of married woman, because in such cases marriage being an ingredient of the offence, the fact of marriage must be strictly proved in the regular way. (5 Cal. 566 ; 5 All. 233).

7. Grounds of opinion, when relevant.—Whenever the opinion of any living person is relevant, the grounds on which such opinion is based are also relevant. (S. 51)

Illustration :—An expert may give an account of experiments performed by him for the purpose of forming his opinion.

Note—In all cases of opinion-evidence the grounds on which the judgment of the witness is formed may be enquired into, because the correctness or otherwise of such opinion may be estimated in many instances on the grounds, upon which it is based, being known. The mere opinions of the witnesses are entitled to little or no regard, unless they are supported by good reasons, founded on facts. If the reasons are frivolous or inconclusive, the opinions of the witnesses are nothing.

The present section applies to the opinions of "*any living person*" whether those opinions be the opinions of *experts* under Ss. 45-46 or of others under Ss. 47-49. This section to some extent repeats the principle involved in section 46. The present section, however, deals with the *subjective* grounds upon which the opinion is held. which can only *Ss. 46 and 51 compared.*

be generally proved by the testimony of the person whose opinion is offered, whereas Sec. 46 deals with the *objective* external facts provable either by that person or others which support or rebut the opinion of an expert.

V. Relevancy of evidence as to Character of parties (Ss. 52-55)

Relevancy of evidence as to character of parties.

When is evidence of (a) of a witness, (b) of a party to a civil proceeding, and (c) of an accused in a criminal trial relevant ?
C.U. 1915 (b).

The last class of relevant facts is the character of parties and this forms the subject-matter of sections 52-55. These sections deal with the character of *parties* and not of *witnesses*. The relevancy of character of *witnesses* is dealt with in Sections 132 and 146—155 *infra*.

The rules with to regard character are divisible into (1) those which concern the character of *witnesses* and (2) those which concern the character of *parties*. In respect of the *first*, the rule is that the character of a witness whether a party or not is always material as affecting his credit. The credibility of a witness is always in issue. For, as witnesses are the media through which the Court is to come to its conclusions on the matters submitted to it, it is always most material and important to ascertain whether such media are trustworthy and as a test of this, questions amongst others, touching character are allowed to be put to the witness in the cause.

"Evidence of the character of parties is not admissible except where the nature of the proceedings is to put the character in issue or where the proceedings are criminal."

In respect of the character of a party, two distinctions must be drawn, namely, between (1) the cases where the character is *in issue* and (2) cases where it is *not in issue*, but is tendered in support of some other issue. Where a party's general character itself is *in issue*, whether in a civil or criminal proceeding proof must necessarily be received of what that character is or is not. But where general character is *not in issue*, but is tendered in proof or disproof of some other issue it is as a general rule excluded on grounds of policy and fairness, since its admission would surprise and prejudice the parties by raking up

the whole of their careers, which they could not possibly come into court prepared to defend. The two exceptions to this general rule are that (1) in *civil* proceedings evidence of character as affecting damages is admissible (S. 55) and (2) in *criminal* proceeding, the fact that the accused is of *good* character is relevant, but that he has a *bad* character is irrelevant, unless evidence has been given that he has a good character in which case it becomes relevant (Ss. 53-54) See *infra*. Sections 52-55 lay down the following rules.—

Explain and illustrate.
C.U. 1914(b)

1. In *civil* cases the fact that the character of any person concerned is such as to render probable or improbable any conduct imputed to him is irrelevant except in so far as such character appears from facts otherwise relevant. (S. 52.)

In civil cases—character to prove conduct imputed irrelevant.

Note.—Generally speaking, evidence as to the character of parties is considered to be irrelevant and inadmissible on grounds of public policy and fairness, since its admission would surprise and prejudice the parties by raking up the whole of their careers, which they could not possibly come in Court prepared to defend. "The business of the Court is to try the case and not the man, and a very bad man may have a very righteous cause" (Wigmore). Accordingly, in civil cases evidence of good or bad character is generally inadmissible as being too remote and at the best affording but slight assistance to the determination of the issue. Such evidence is foreign to the points in issue and only calculated to create prejudice. If a man is sued for breaking his promise, as for wrongful detainer of another man's goods, as for selling an article inferior to the sample, evidence can not be given to show that it was likely, from his disposition and reputation that he should do that which is alleged against him. It is obvious that enquiries into the ordinary transactions of life would be indefinitely prolonged if in deciding whether a man had or had not done something, the Court would be at liberty to enquire whether he was

How far is "character" relevant and admissible in evidence in (a) civil suits, (b) criminal cases? Bom. 1919(b)

Discuss the law relating to the relevancy of evidence of character in civil and criminal proceedings. All 1915. How far is character relevant and admissible in criminal cases? C.U. 1919(b); Bom. 1909(b). Where is the character of a

person admissible in evidence ?
C.U. 1923(a).
How is character defined in I. E. Act ?
Mad. 1919(b).

the sort of man to do it. We do not know enough about each other's motives and dispositions and we cannot analyse them with sufficient delicacy or minuteness, to allow us safely to draw inferences from them as to the way in which people will behave on any particular occasion. In civil enquires, accordingly, all evidence of this nature is rejected, though, a Judge may of course, draw his inferences from the relevant facts proved as to the character of the parties concerned and such inferences may materially affect the probability of any conduct imputed to them.*

Character.—For the meaning of the term “character” as used in this section and sections 53 and 54 see *Explanation* to S. 55.

“Except in so far as such character.....otherwise relevant.”—This section excludes evidence of character from being given only for the purpose of “rendering probable or improbable any conduct imputed to the party.” But, when the facts which are relevant otherwise than for the purpose of showing character are proved and those facts, in addition to their primary inference, raise others concerning the character of the parties to the suit, such facts become relevant not only to prove the facts for which they were directly tendered, but also for the purpose of showing the character of the parties concerned. In such a case, the Court may form its conclusion as to the character of the parties from their conduct as exhibited by the relevant facts proved in the case.

Scope of the section.

Are the following facts relevant :—

(a) When the question was whether A, a brewer sold good beer to B, the fact that A sold good beer to C, D and E other publicans ;
(b) when the question was whether one person acted as agent for another on a particular occasion, the fact that he so acted on other occasions ?

AN 1915.

[See pp.90-91]

* In criminal enquiries, however, the case is different. There is a fixed line between crime and innocence and when the question is whether a man has committed an offence or not, his character becomes a material consideration. Sometimes it is almost conclusive. In forming a judgment of criminal intention, evidence that the party had previously borne a good character is often highly important. In doubtful cases, especially, good character is generally entitled to great consideration. Where the evidence is wholly circumstantial and the testimony for and against the accused is nearly balanced, the weight of a good character ought to exert a potent influence on his favour. (C.R. Cr. Ev.).

2. In *criminal* proceedings the fact that the person accused is of a *good* character is relevant. (S. 53.)

In criminal cases previous good character relevant.

Note.—Evidence of *good* character is admissible as it is of the utmost importance in explaining the conduct of an accused person and judging of his innocence or guilt. "Good character is an important fact with every man ; and never more so than when he is put on trial charged with an offence which is rendered improbable in the last degree by a uniform course of life wholly inconsistent with any such crime. There are cases when it become a man's sole defence and yet may prove sufficient to outweigh evidence of the most positive character. The most clear and convincing cases are sometimes rebutted by it, and a life of unblemished integrity becomes a complete shield of protection against the most skilful web of suspicion and falsehood which conspirators have been able to weave. Good character may not fully raise a doubt of guilt which would not otherwise exist, but it may bring a conviction of innocence. In every criminal trial it is a fact which the defendant is at liberty to put in evidence, and being in, the jury have a right to give it such a weight as they think it entitled to." (Will's Cir. Ev.)

Is character good or bad relevant in civil or criminal proceedings ? C. U. 1925 (b), 26 (a). Discuss the relevancy of proof of character in civil and criminal cases. C. U. 1928 (a).

The principle upon which good character may be proved is that it affords a presumption against the commission of crime. This presumption arises from the improbability, as a general rule as proved by common observation and experience, that a man who has uniformly pursued an honest and upright course of conduct will depart from it and do an act so inconsistent with it. Such a person may be overcome by temptation and fall into crime, and cases of that crime often occur ; but they are exceptions. (Wigmore).

3. (1) In criminal proceeding the fact that the accused person had a bad character is irrelevant if evidence has been given that he has a good

Previous bad character not relevant.

except in
reply.
"In criminal
proceeding...
...irrelevant."
(S. 54)
Comment,
Bom. 1914(b).
Under what
circumstances
may evidence
of bad
character of
an accused
person be
given in
criminal
proceedings?
Punj. 1917.

character, in which case it becomes relevant.
(S. 54).

(2). This section does not apply to cases in which the bad character of any person is itself a fact in issue. (Expl. 1).

(3). A previous conviction is relevant as evidence of bad character. (Expl. 2).

Note.—Evidence of *good* character is allowed to be given, on grounds of humanity, for the purpose of raising a presumption of innocence and as tending to explain conduct; but evidence of *bad* character is in general excluded as being too remote and as tending to prejudice the accused, whose guilt must be established by proof of the facts with which he is charged, and not by presumptions to be raised from the character which he bears. The exceptions are :—
(1) Where the bad character is itself a fact in issue, as distinguished from cases where evidence of character is tendered in support of some other issue. Being a fact in issue it must necessarily be proved. (2) Where the accused has by giving evidence of good character in his own aid challenged enquiry on the point, in which case the prosecution may in rebuttal offer evidence of his bad character.

When is bad
character of
an accused
relevant in a
criminal case?
Mad 1919 (b).
In what cir-
cumstances
and in regard
to what
matter is
reputation
evidence
admissible?
State briefly
the reasons
for the
admission of

Evidence of bad character.—The general rule is that it is not competent to give evidence of the *bad* character or disposition of an accused person with a view of raising an unfavourable presumption against him, because the sound policy of law requires that even the worst criminal shall receive a fair and unprejudiced trial. Evidence of *bad* character is excluded on the ground that, "a man's general bad character is a weak reason for believing that he was concerned in any particular criminal transaction for it is a circumstance common to him and hundreds and thousands of other people." But such evidence is admissible :—*First*, where the very nature of the proceedings is such as to put in issue the character of the accused. [Thus in proceedings

under Sec. 107, Criminal Procedure Code, evidence of bad character is relevant under S. 5 *ante*. In an action for seduction the character of the female for chastity is directly in issue and may be impeached either by general evidence of misconduct or proof of particular acts of it. So a charge of rape or of assault with intent to commit rape, brings the question of the chastity of the female so far in issue that it is competent to the accused to give general evidence of her previous bad character in this respect]. *Secondly*—If evidence is given to the effect that the accused has a good character, the prosecution may tender evidence of his bad character to rebut that evidence.

such evidence in cases in which it is admissible and its rejection in others, Mad. 1918(b). When does the evidence of character of parties become relevant in judicial proceedings? Mad. 1921(a). When is evidence as to character of parties and witnesses relevant in civil and criminal cases? Bom. 1918 (b).

Evidence of previous conviction—When evidence of good character is given by an accused person, the fact that he has been previously convicted of an offence is admissible as evidence of bad character under this section.

A previous conviction may also be relevant (i) under Sec. 8 (as showing motive); (ii) under Sec. 14, Explanation 2 (when the existence of any state of mind or body or bodily feeling, is in issue or relevant), and (iii) under Sec. 13 [*vide* ill. (e)] of this Act and also (iv) under Sec. 75 of the Indian Penal Code.

Value of character evidence.—Evidence of character may explain conduct, but cannot alter facts nor prove facts. The evidence of good character is no guarantee that the accused could not have done the alleged criminal act. That piece of evidence can go to the jury as an important item for consideration only when some reasonable doubt exists as to the guilt of the accused. It has been held by the Bombay High Court that no importance can be attached to the evidence of good character of the accused if the case against him is clear. (8 Bom. 227).

Sir James Fitz-James Stephen in his *Introduction to the Evidence Act* observes: "Evidence of character is, generally speaking, only a make-weight, although there are two classes

of cases in which it is highly important :—(1) Where conduct is equivocal or even presumably criminal. In this case evidence of character may explain conduct and rebut the presumptions which it might raise in the absence of such evidence. A man is found in possession of stolen goods. He says he found them and took charge of them to give them to the owner. If he is a man of very high character this may be believed. (2) When a charge rests on the direct testimony of a single witness, and on the bare denial of it by the person charged. A man is accused of an indecent assault on a woman with whom he was accidentally left alone. He denies it. Here a high character for morality on part of the accused person would be of importance." In his *General View of the Criminal Law of England* (pp. 331-312) he makes the following observations :—"Though general evidence of bad character is not admitted against the prisoner, general evidence of good character is always admitted in his favor. This would, not doubt, be an inconsistency justifiable or at least intelligible on the ground of humanity of English law, if such evidence were not often of great importance as tending to explain conduct. A loses his watch : B is found in possession of it next day, and says he found it, and was keeping it for the owner. If A and B are strangers, and if B can call no one to speak to his character, this is a very poor excuse. but if B is a friend of A's and of the same position in life, and if he calls many respectable people, who have known him from childhood, and say he is a perfectly honest man, the story becomes highly probable. If the same thing happened to a thoroughly respectable, well-established inhabitant of the town, say, for instance to the Rector of the Parish, being a man of first-rate character and large fortune, no one would think twice of it. Those illustrations give the true theory of evidence of character. Judges frequently tell to juries that evidence of character cannot be of use where the case is clearly proved except in mitigation (or possibly aggravation) of

punishment ; but that if they have any doubt, evidence of character is highly important. This always seems to me to be equivalent to saying, "If you think the prisoner guilty, say so ; and if you think you ought to acquit him independently of the evidence of character, acquit him rather the more readily because of it." Evidence of character, would thus be superfluous in every case. The true distinction is, that *evidence of character may explain conduct, but cannot alter facts.*"

4. (1) In *civil* cases the fact that the character of any person is such as to affect the amount of damages which he ought to receive, is relevant. (S. 55.)

Character as affecting damages.

[But *good* character being presumed cannot be proved in *aggravation* of damages, but *bad* character is admissible in *mitigation* of damages.]

Note.—In suits in which damages are claimed the amount of damage is a fact in issue. Therefore if the character of the plaintiff is such as to affect the amount of damages which he ought to receive such character becomes relevant for the purpose of the determination of that fact in issue. Thus, for instance, in an action for defamation evidence of the plaintiff's general bad reputation may be given. Similarly in an action for breach of promise of marriage the defendant may prove in mitigation of damages that the plaintiff is a person either of bad character or of coarse and brutal manners.

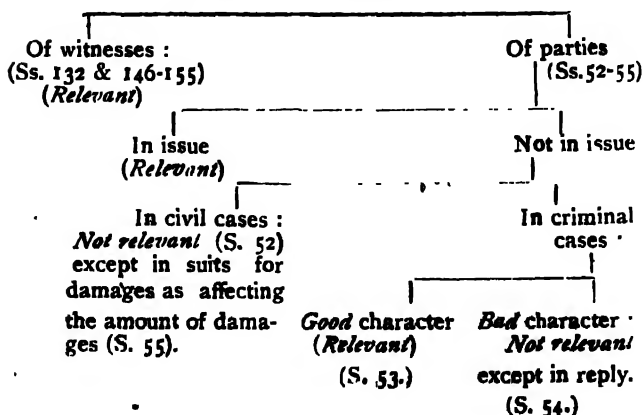
(2) In sections 52—55 the word "character" includes both reputation and disposition. but, except as provided in S. 54, evidence may be given only of *general* reputation and *general* disposition, and not of particular acts by which reputation or disposition were shown. (Expl.)

Explanation of "character." Does the term 'character' in the I. E. Act differ from that given in English Law? *Mad. 1919(b), 1921 (a).*

Note.—According to English law "character" simply means *reputation* as distinguished from *disposi-*

tion. 'Reputation' means what is 'thought of a person by others and is constituted by public opinion; it is the general credit which a man has obtained in that opinion. 'Disposition' comprehends the springs and motives of actions, is permanent and settled, and respects the whole frame and texture of the mind. Both reputation and dispositions lie in the general habit of the man rather than in particular acts and manifestations.

Evidence as to Character—



PART II.—Proof.

The Indian Evidence Act, as has been said before, consists of three parts and the law of evidence as embodied in it contains provisions upon the following subjects :—

I. The *relevancy* of facts or the question as to what sort of facts may be proved in order to establish the existence of the right, duty or liability defined by substantive law.

II. The *proof* of relevant facts i. e., the question as to what sort of proof is to be given of facts which may be proved.

III. The *production of proof* of relevant facts *i. e.*, by whom and in what manner the proof of a fact must be given.

Part I of the Act deals with the relevancy of facts or with answer to the question "what facts may be proved" while the present part proceeds to enact rules as to the manner in which a fact, when relevant, must be proved.

General Scheme of Part II.—Part II consists of four Chapters (III-VI), containing 45 sections (Ss. 55-100). Chapter III deals with facts which need not be proved. Chapter IV deals with oral evidence. Chapter V deals with documentary evidence. Chapter VI deals with the question of the exclusion of oral by documentary evidence and the exceptions thereto.

The rules with regard to proof as dealt with in this part of the Act may be briefly stated as follows :—Some act need not be proved at all, because it may be one of so much notoriety that the Court will take judicial notice of it or it may be admitted by the parties. In either of these cases no evidence of its existence need be given. Chapter III disposes of the subject. Besides the two kinds of facts mentioned above, all other facts must be proved by legal evidence which is either oral or documentary. Every fact except (generally speaking) the contents of a document, may be proved by oral evidence. Oral evidence must in all cases be direct, that is to say, it must consist of an assertion by the person who gives it that he directly perceived the fact to the existence of which he testifies. (Chapter IV) Documentary evidence is either primary or secondary. Primary evidence is the document itself produced in Court for inspection. Secondary evidence varies according to the nature of the document. In the case of private documents a copy of the document, or an oral account of its contents, is secondary evidence. In the case of some public documents, examined or certified copies must or may be produced in

the absence of the documents themselves. (Chapter V) Whenever any public or private transactions has been reduced to a documentary form the document in which it is reduced becomes exclusive evidence of that transaction and its contents cannot, except in certain cases expressly defined, be varied by oral evidence, though secondary evidence may be given of the contents of the document. (Chapter VI.)

CHAPTER III.—Facts which need not be proved (Ss. 56-58.)

All facts in issue and relevant facts must, as a general rule, be proved by evidence, that is, by the statement of witnesses, admissions or confessions of parties and production of documents. See notes under S. 3 *ante* To this general rule, there are two exceptions which are dealt with by this chapter.

Facts judicially noticeable need not be proved. What do you understand by—judicial notice. All 1917, Bom. 1917(a), 1919 (b).

1. (a) **Facts judicially noticeable need not be proved.**—No fact of which the court will take a judicial notice need be proved. (S 56.)

Note.—Certain facts are so notorious in themselves, or are stated in so authentic a manner in well-known and accessible publications that they require no proof. The Court, if it does not know them, can inform itself upon them without formally taking evidence. These facts are said to be judicially noticed. "Judicial notice" thus means notice or recognition of facts taken by a Judge without proof by any evidence. No evidence of any fact of which the Court will take judicial notice need be given by the party alleging its existence; but the Judge, on being called upon to take judicial notice thereof, may if he is unacquainted with such facts refer to any person or to any document or book of

reference for his satisfaction in relation thereto or may refuse to take judicial notice thereof unless and until the party calling upon him to take such notice produces any such document or book of reference *e. g.*, a Judge will refer in case of need to an almanac, or to a printed copy of the statutes or write to the Foreign officer to know whether a State has been recognised.

What facts need not be proved by the parties to legal proceeding? Punj. 1915.

(b) Of what facts the Court takes judicial notice :—The Court shall take judicial notice of the following facts :—

- (1) All laws or rules having the force of law in any part of British India.
- (2) All public Acts passed by Parliament, and all local and personal Acts directed by Parliament to be judicially noticed.
- (3) Articles of war for His Majesty's Army or Navy.
- (4) The course of proceeding of Parliament and of the Councils for the purposes of making Laws and Regulations established under the Indian Councils Act or any other law for the time being relating thereto.
- (5) The accession and the sign manual of the Sovereign for the time being of the United Kingdom of Great Britain and Ireland.
- (6) All seals of which English courts take judicial notice, the seals of all the courts of British India and of all the Courts out of British India established by the authority of the Governor General or any local Government in Council, the seals of Courts Admiralty and Marine jurisdiction and of the Notaries Public, and all seals which any person is autho-

What is judicial notice and of what facts is such notice taken? Is it necessary to prove when the present war commenced and who are the belligerents? Give your reasons. C.U. 1916(a). Classify the facts of which judicial notice is taken without formal proof. Bom. 1913(a).

rised to use by any Act of Parliament, or other Act or Regulation having the force of law in British India.

- (7) The accession of office, names, titles, functions and signatures of the persons filling, for the time being, any public office in any part of British India, if the fact of their appointment to such office is noticed in the Gazette of any Local Government.
- (8) The existence, title and national flag of every State or Sovereign recognised by the British Crown.
- (9) The divisions of time, the geographical divisions of the world, and public festivals, fasts and holidays, notified in the official Gazette.
- (10) The territories under the dominion of the British Crown.
- (11) The commencement, continuance and termination of hostilities between the British Crown and any other State or body of persons.
- (12) The names of the members and officers of the court and of their deputies and subordinate officers and assistants, and also of all officers acting in execution of its process and of all advocates, attorneys, proctors, vakils, pleaders and other persons authorised by law to appear or act before it.
- (13) The rule of the road on land or at sea*.

What is meant by the rule of the road? C.U. 1916(a).

* For example the rule that horses and carriages respectively should keep to the left side, that steamboats should keep out of the way of sailing ships, etc. These are enacted for the prevention of collisions.

(c) In all these cases and also on matters of public history, literature, science, or art, the Court may resort for its aid to appropriate books or documents of reference.

(d) If the Court is called upon by any person to take judicial notice of any fact, it may refuse to do so unless and until such person produces any such book or document as it may consider necessary to enable it to do so. (S. 57)

Note - This section enumerates the several facts of which the Courts shall take judicial notice. But the list is not exhaustive and the section does not prohibit the Court from taking judicial notice of other facts not mentioned therein.

With regard to the facts enumerated in Sec. 57, if their existence comes into question, the parties who assert their existence, or the contrary, need not in the first instance, produce any evidence, in support of their assertions. They need only ask the Judge to say whether the facts exist or not, and if the Judge's own knowledge will not help him then he must look the matter up; further the Judge can, if he thinks proper, call upon the parties to assist him. But in making this investigation the Judge is emancipated entirely from all the rules of evidence laid down for the investigation of facts in general. He may resort to any source of information which he finds handy and which he thinks will help him. Thus he may consult any book or obtain information from a bystander. (Markby).

* 2. (1) **Facts admitted need not be proved.**
No fact need be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing or which before the hearing, they agree to admit by any writing under their hands, or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings. (S. 58).

Facts admitted need not be proved :

(2) The Court may, however, in its discretion, require the facts admitted to be proved otherwise than by such admission.* (Proviso).

Note.—Facts admitted need not be proved and obviously so, for a Court, in general, has to try the questions on which the parties are at issue, not those on which they are agreed. Admissions which have been deliberately made for the purposes of the suit, whether in the pleading or by agreement will act as an estoppel to the admission of any evidence contradicting them. (5 Bom. 143).

Facts may be admitted (1) by agreement (a) *at* the hearing or (b) *before* the hearing or (2) by the pleadings. An agreement made *before* the hearing to admit of facts must be in writing and must be made with reference to the particular litigation. In the Civil Procedure Code (Act V of 1908) provision has been made for admission on facts by the parties or their pleaders before the hearing. (O. XII Rr. 1-9).

As to admissions at the hearing they may be made either at the time of the settlement of issues (O. XIV. C. P. C.) or at any time after commencement and before the conclusion of the hearing.

Proviso.—The proviso gives full discretion to the Court to require the facts admitted to be proved otherwise than by such admission. When the court is satisfied that an admission has been obtained by fraud, or that there is other good and sufficient cause, it will be in its discretion, under the proviso to sec. 58, to require the fact to be proved, otherwise than by such admission. (28 Mad. 183 at p. 265).

* This section deals with the subject of admission made for the purpose of dispensing with proof at the trial, which admissions must be distinguished from evidentiary admissions or those which are receivable as evidence at the trial under sec. 17-31.

CHAPTER IV. Oral Evidence. (Ss. 59-60)

Rules as to oral evidence—1. All facts except the contents of documents, may be proved by oral evidence. (S. 59).

2. Oral evidence must in all cases whatever, be direct ; that is to say—

(a) if it refers to a fact which could be seen, it must be the evidence of a witness, who says he saw it ;

(b) if it refers to a fact which could be heard, it must be the evidence of a witness, who says he heard it ;

(c) if it refers to a fact which could be perceived by any other sense or in any other manner, it must be the evidence of a witness who says he perceived it by that sense* or in that manner ;

(d) if it refers to an opinion or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on these grounds.

Exception—The opinions of experts expressed in any treatise commonly offered for sale and the grounds on which such opinions are held, may be proved by the production of such treatise, if the author is (i) dead or (ii) cannot be found or (iii) is incapable of giving evidence or (iv) cannot be called as a witness without an amount of delay or expense which the Court regards as unreasonable.*

3. If oral evidence refers to the existence or condition of any material thing other than a document, the Court may, if it thinks fit, require the production of such material thing for its inspection. (S. 60).

How are admissions proved ?
C.U. 1926(b).
[See p. 102 ante.]

State how opinions of experts may be ascertained.
C.U. 1912(b).

* This proviso should be read with Ss. 45 and 45 ante. The English law does not admit such evidence.

Oral evidence.—Oral evidence, as defined in sec. 3 *supra*, means "all statements which the Court permits or requires to be made before it, by witnesses in relation to matters of fact under enquiry." Oral evidence is always admissible except when contents of documents have to be proved. It is an error to suppose that oral evidence not supported by documentary evidence is of no importance whatever for the determination of the true merits of the case. Of course, before acting upon such testimony its credibility should be tested both intrinsically and extrinsically. The distinction between primary and secondary evidence is not recognised in the Act so far as oral testimony is concerned ; such distinction being observed in the case of documents only. Where a fact may be proved by oral evidence, it is not necessary that the statement of the witness should be oral, *i.e.*, by the words of mouth. Any method of communicating thought which the circumstances of the case or the physical condition of the witness demand may in the discretion of the Court be employed. Thus a deaf-mute may testify by writing or by gestures.

Except the contents of documents.—The contents of documents may not generally be proved by oral evidence, because it is a cardinal rule of evidence that where written documents exist, they shall be produced as being the best evidence of their own contents. But contents of documents may be proved by oral evidence under certain circumstances that is to say, when such evidence of their contents is admissible as secondary evidence. *Vide S. 65.*

Comment
Bom. 1914(b).
What is
meant by
saying that

Oral evidence must be direct.—Sec. 60 declares that oral evidence must in all cases be *direct** and not hearsay ; that is, it must consist of a declaration by the

* The word "direct" is here used as opposed to mediate, derivative second-hand or what is generally called "hearsay" and not to "circumstantial." In this sense, all evidence, whether direct or circumstantial, must be direct *i.e.* from the best source.

witness that he perceived by his own senses the fact to which he testifies. What evidence is said to be direct is explained and illustrated in Sec. 60. This section asserts that whatever may be the relation of a fact to be proved to the fact in issue it must, if proved by oral evidence, be proved by direct evidence. Referring to this section the Select Committee in their Report said "This provision taken in connection with the provisions of relevancy contained in Chapter II, will, we hope, set the whole doctrine of hearsay in a perfectly plain light, for their joint effect is this: *1st*—The sayings and doings of third persons are, as a rule, irrelevant, so that no proof of them can be admitted; *2nd*—In some excepted cases they are relevant; *3rd*—Every act done or word spoken which is relevant on any ground, must (if proved by oral evidence) be proved by some one who saw it with his own eyes or heard it with his own ears."

Opinions of experts.—The rule that "oral evidence in all cases must be direct" is subject to a proviso which provides that if the fact to be proved is opinion of an *expert** who cannot be called and if such opinion has been expressed in any published treatise, it may be proved by the treatise.

Hearsay evidence.—See p. 36 *supra*. Hearsay evidence, strictly speaking means the evidence of a witness who simply testifies to what he has heard from others (who are not sworn as witnesses) and not what he knows or has perceived himself. In the case of hearsay, the witness is simply a *conduit pipe*, communicating what he has heard from others. [The term "hearsay" is, however, now used to denote the whole class of derivative, mediate or indirect testimony, whether oral or documentary.] For instance, if an offence is committed by A, and B has seen it being done B himself must, under S. 60, come and state the fact of his having seen it, on oath; and in such a case if C comes and

oral evidence must be direct? Illustrate a few exceptions to this rule. C. U. 1928(4). "Hearsay is no evidence" Discuss and illustrate exceptions to this rule. C. U. 1927(6). What is hearsay evidence? All. 1919. Explain and discuss the rule; "Oral evidence in all cases whatever must be direct." What exceptions to this rule are permissible? Give reasons and illustrations in support of your answer. C. U. 1912(a). Explain fully the rule that oral evidence must in all cases be direct. Is there any exception to the rule? Illustrate your answer by concrete examples. C. U. 1909. What are the reasons for excluding

* The proviso applies only in the case of experts: In all other cases, the person who holds the opinion must be called as a witness.

'hearsay as evidence.'
C. U. 1904.
 1901 :
 All, 1919 :
 Bom. 1919(a):
 Mad. 1917(a).
 What is
 "hearsay evidence" ?
 On what principle is it generally excluded ?
C. U. 20 (b).
 The principle of English law is that the best evidence available must be tendered, and that best evidence only.
 State giving instances how this principle is carried out in the Indian Evidence Act.
 Bom. 1917(a).
 Under what circumstances will a witness in a civil suit be allowed to testify to what he heard another person say ?
 Illustrate your answer by examples.
C. U. 1908.
 Give reasons for the following rule and state any exception to it that you

states that he heard that B saw it, C's testimony would be excluded on the ground of its being 'hearsay.' The general rule with regard to hearsay evidence is, that it is not admissible and within the scope of this rule are included all statements, oral or written, the probative force of which depends, either wholly or in part, on the credit of an unexamined person, notwithstanding that statements may possess an independent evidentiary value derived from the circumstances under which they were made and also where no better evidence of the facts stated is to be obtained." (Law Times).

Reasons for excluding hearsay evidence.—As a general rule, hearsay evidence is not admissible in as much as the original narrator, not being called as a witness is neither subjected to oath nor cross-examination and as such his statement cannot be relied on as legally true. Hearsay evidence is rejected (a) because it is not given upon oath* ; (b) because it cannot be tested by cross-examination ; (c) because it supposes some better testimony, which might be adduced in the particular case, (d) because of its tendency to protract legal investigation to an embarrassing and dangerous length ; (e) because of its intrinsic weakness. (f) because of its incompetency to satisfy the mind as to the existence of the fact, and (g) because of the fraud which might be practised with impunity under its cover." (Taylor).

Exceptions to the rule against hearsay.—As

* Cf. Best on Evidence : The foundation of the rule lies much deeper than this : Instead of standing as a maxim that the law requires all evidence to be given on oath, we should say the law requires all evidence to be given under personal responsibility, i. e. every witness must give his testimony, under such circumstances as expose him to all the penalties of falsehood, which may be inflicted by any of the sanctions on truth. The true principle therefore appears to be this,---that all second-hand evidence, whether of the contents of a document or of the language of a third person, which is not connected by responsible testimony of the party against whom it is offered, is to be rejected.

said above 'hearsay' is excluded from legal evidence ; but the circumstances under which a statement is made by a person (not before the Court) sometimes mitigate the danger, if not afford a guarantee for the truth of the statement ; such exceptional cases are to be found in Secs. 17-38 of this Act. When falling within those exceptions, hearsay is admissible.

know :—
"Hearsay evidence is not admissible."
Bom. 1918(a).
What is the basis and what are the limitations of the exception that hearsay is evidence in matters of public or general interest.
All. 1910.

Productions of material objects.—By way of securing that the Court shall, in every instance, have before it the best possible means of forming an opinion, it is provided that when the evidence refers to the existence or condition of any material object, the court may require it to be produced for inspection. Such inspection is frequently indispensable in order to the proper understanding of the oral evidence, and enables the court to draw important inferences as to the truthfulness of the witnesses. (C. & S.).

Admissions.—Admissions made by a person made be proved by any witness who heard them without calling the party by whom they are made. They are in the nature of original evidence and not hearsay. They are, therefore, legal evidence, though the person is alive and has not been cited (5 Mad. 239 ; Taylor S. 793.)

CHAPTER V. Documentary Evidence.

(Ss. 61-90).

Documentary evidence means all documents produced for the inspection of the court and the definition given of a "document" (in Sec. 3) is very wide, covering many things which would not be considered 'document' in the popular acceptance of the word. Aside from real evidence of which the court or jury are the original percipient witnesses and evidence of matters of which judicial cognizance is taken, all evidence comes to the tribunal either (a) as the statement

of a witness or (8) as the statement of a document. As the last chapter dealt with the mode of proof in the case of the statements of witnesses, so the present chapter deals with the mode of proof of statements which are contained in documents.

How may the contents of a document be proved?

C. U. 1909, 1926 (b).

"As a general rule, documents are provable by the production of the originals alone."

Explain and illustrate the principle which underlies this rule.

C. U. 1914 (b).

Give example of the principle that "no evidence shall be received which shows on its face that it only derives its force from some other evidence which is withheld."

C. U. 1908.

"In determining the admissibility of evidence the production of the best evidence should

1. Proof of contents of documents.—The contents of documents may be proved either by *primary* or by *secondary* evidence. (S. 61).

Note.—Sec. 61 lays down that the contents of the documents may be proved either by primary or by secondary evidence and the rule means that there is no other method allowed by law for proving the contents of documents. (7 All. 738.)

Sec. 64 lays down the general rule that documents *must* be proved by *primary* evidence* and that no secondary evidence of their contents can be given except in the cases mentioned in S. 65. This rule is based on the "best evidence" principle or that the best evidence that the case admits of must always be produced. [This rule does not demand that the greatest amount of evidence which can possibly be given of any fact should be offered, it is designed to prohibit the introduction of such evidence as from the nature of the case allows room for supposing that better evidence is in the possession of the party and to prevent fraud. For,

* The rule that "documents *must* be proved by primary evidence" means that their *contents* must be proved by primary evidence. Where the contents of any document are in question, either as a fact directly in issue or as a subaltern principal fact, the document is the proper evidence of its own contents. But where a document of any description is not a fact in issue and is merely used as evidence to prove some fact independent proof *altunde* is receivable. (See) Thus, although a receipt has been given for the payment of money, proof of the fact of payment may be made by any person who witnessed it. Where the contents of a marriage register are in issue, verbal evidence of these contents is not receivable but the fact of the marriage may be proved by the independent evidence of a person who was present at it. (9 All. 357 et p. 356.)

when better evidence than that which is offered is withheld it is only fair to presume that the party has some sinister motive for not producing it which would be frustrated, if it were offered. It is a cardinal rule of evidence, not one of technicality, but of substances, which it is dangerous to depart from, that where written documents exist they shall be produced as being, the best evidence of their own contents.]

In *Vincent v. Cole* (3 C. & P., 481) Lord Tenterden said, "I have always acted most strictly on the rule, that what is in writing shall only be proved by the writing itself. My experience has taught me the extreme danger of relying on the recollections of witnesses, however honest, as to the contents of written instruments; they may be so easily mistaken, that I think the purposes of justice require the strict enforcement of the rule." Where the contents of any document are in question either as a fact in issue or as a subaltern principal fact, the document is the proper evidence of its own contents, and all derivative proof is rejected until its absence is accounted for. (9All. 356).

Sir James Stephen in his *Introduction to the Evidence Act* observes: "One single principle runs through all the propositions relating to documentary evidence. It is that the very object for which writing is used is to perpetuate the memory of what is written down, and so to furnish permanent proof of it. In order that full effect may be given to this, two things are necessary, namely that the document itself should, whenever it is possible, be put before the Judge for his inspection, and that if it purports to be final settlement of a previous negotiation, as in the case of a written contract, it shall be treated as final and shall not be varied by word of mouth. If the first of these rules were not observed the benefit of writing would be lost. There is no use in writing a thing down unless the writing is read. If the second rule were not observed people

be exacted." Discuss the above proposition. C. U. 1900. Define "proved." What does the word signify when applied to a document? By what modes are modern private documents proved? Mad. 1917. Distinguish between primary and secondary evidence. Bom. 1920(a). "The best evidence that the case admits of must always be produced." Explain and discuss with special reference to the provisions of the Indian Evidence Act. C.U. 1923(b), '28 (a). (See Ss. 64 & 60). "What is in writing shall only be proved by the writing itself." Are there any exceptions to this rule? C.U. 1928(b).

would never know when a question was settled as they would be able to play fast and loose with their writings”.

What is
primary
evidence ?

C. U. 1901,
1905, 1910(a),
1913(b), 16(a);
Bom. 1909 (a)
& (b), 1912(b),
1918 (b) ;
Mad. 1917(b),
1918 (b).

Explain :—
primary
evidence.
Punj. 1917.

Comment.
Bom. 1915(a).

Documents
executed in
several parts.

Documents
executed in
counterparts.

2. Primary Evidence.—Primary evidence means the document itself produced for the inspection of the Court. (S. 62).

(2) Where a document is executed in several parts, each part is primary evidence of the document. (Expl. 1.)

Note.—When an instrument is executed by all the parties in duplicate, or triplicate and each party keeps one, each instrument is treated as original and each is primary evidence of all others. “Sometimes each party to a transaction wishes for the sake of convenience to have a complete document in his possession. To effect this, the document is written out as many times over as there are parties, and each document is executed *i. e.*, signed or sealed as the case may be, by all the parties. Any one of them may be produced as primary evidence of the contents of the document.” (Ratanlal).

(3) Where a document is executed in counterparts, each counterpart being executed by one or some of the parties only, each counterpart is primary evidence *as against the parties executing it.* (Expl. 1.)

Note.—When there are two parties to the transaction and each of the parties signs a distinct document and delivers it one to the other respectively, the documents are termed “counterparts.” A common instance of a document executed in counterparts is that of *patlak* and *kabutyat*.

Where a document is executed in counterparts each counterpart being executed by one or some of the parties only, each counterpart is *primary* evidence *as against the parties executing it* and *secondary* evidence *as against the other parties* (*Vide* *cl. 4*, Sec. 63). Thus if the transaction is a contract between A and B the document is copied out

twice, and A alone signs one document, whilst B alone signs the other. A then hands to B the document signed by himself and B hands to A the document signed by himself. Here the document signed by A is *primary* evidence as against A and *secondary* evidence as against B, while the document signed by B is primary evidence as against B and secondary evidence as against A.

(4). Where a number of documents are all made by one uniform process, as in the case of printing, lithography or photography, each is primary evidence of the contents of the rest; but, where they are all copies of a common original they are not primary evidence of the contents of the original. (Expl. 2).

Illustration—A person is shewn to have been in possession of a number of placards, all printed at one time from one original. Any one of the placards is primary evidence of the contents of any other, but no one of them is primary evidence of the contents of the original.

Note.—*Vide* Sec. 63, cl. 3. It is indeed a matter of common knowledge that copies made by mechanical or similar process, are themselves uniform, but a copy itself affords no guarantee of its being uniform with the original.

3. Secondary evidence—Secondary evidence means and includes—

(1) certified copies given under the provisions of Sec. 76 *infra*;

(2) copies made from the original by mechanical process which in themselves insure the accuracy of the copy, and (2a) copies compared with such copies;

(3) copies made from or compared with the original;

(4) counterparts of documents as against the parties who did not execute them;

Define secondary evidence.
Give two examples.
C. U. 1901, '05, '08, '09
'10(a), '13(b)
'14(a), '16(a);
All, '17, '19;
Bom. '09 (a)
& (b), '12(b),
'15(b), '19(b),
'20(b), '21(b);
Mad. '18 (b).

What is secondary evidence ?
C.U. '27 (a),
'26 (b).

Mad. 1919.
When is a party entitled to give secondary evidence of a document without calling upon the party in possession of the same to produce it ?
Mad. '19.
State the circumstances under which a party is entitled to give secondary evidence of the contents of a document in the possession of his adversary and for the production of which notice has been given.

Bom. '16 (a).
When is a copy of a copy secondary evidence ?

Mad. '19 (a).
[*Vide* cl. (a) and illa. (b) & (c)].

How can a plaintiff prove the contents of a letter which he

'5) oral accounts of the contents of a document given by some person who has himself seen it. (S. 63)

*Illustrations**—(a) A photograph of an original is secondary evidence of its contents, though the two have not been compared, if it is proved that the thing photographed was the original. (b) A copy compared with a copy of a letter made by a copying machine is secondary evidence of the contents of the letter, if it is shewn that the copy made by the copying-machine was made from the original. (c) A copy transcribed from a copy, but afterwards compared with the original, is secondary evidence ; but the copy not so compared is not secondary evidence of the original, although the copy from which it was transcribed was compared with the original. (d) Neither an oral account of a copy compared with the original, nor an oral account of a photograph or machine-copy of the original, is secondary evidence of the original.

Note.—This section describes what constitutes "secondary evidence" while sec. 62 defines the meaning of "primary evidence." Primary evidence is evidence which the law requires to be given first. Secondary evidence is evidence which may be given in the absence of the better evidence which the law requires to be given first, when a proper explanation is given of the absence of that better evidence.

The distinction between 'primary' and 'secondary' evidence applies to documents only.

Forms of secondary evidence.—This section makes mention of five kinds of secondary evidence, which may properly be brought under two general headings :—I. Copies (cls. 1-4) II. Oral testimony (cl. 5).

Secondary evidence under the Act means and includes

* III. (a) refers to the first part of cl. (2), while II. (b) refers to the latter part of cl. (2). III. (c) refers to cl. (3) and III. (d) to cl. (5).

(1) certified copies ; (2) copies made from the original by mechanical processes ; (3) copies made from or compared with the original ; (4) counter-parts of document, as *against the parties who did not execute them* ; and (5) oral account of the contents of a document by some one who has himself seen it.

Clause 1—The expression “certified copies” is defined in Sec. 76 and further provision for them is to be found in Secs. 77, 78, 79 and 86. The correctness of certified copies is presumed in S. 75 and under S. 77, the contents of public documents may be proved by certified copies without producing the originals.

Clause 2.—This clause read with ills. (b) and (c) shows that a copy of a copy *i. e.*, a copy transcribed from and compared with a copy is inadmissible, unless the copy with which it was compared was made by some mechanical process, which itself insures the accuracy of such copy. [But under S. 57 (5) of the Indian Registration Act (XV of 1908) a copy of a copy is admissible to prove the contents of the original.] A copy not prepared in the manner described in this clause is only admissible where it has been compared with the original ; and in the absence of evidence to that effect, a copy made from a copy, although the latter has been so compared is not admissible (Cunningham, 149).

Clause 3.—Under this clause, copies made from the original or copies compared with original, are admissible as secondary evidence. A copy of a copy when compared with the original would be receiveable as secondary evidence of the original ; but the copy not so compared is not secondary evidence of the original although the copy from which it was transcribed was compared with the original [*Vide* ill (c)]. Thus a copy of a certified copy of a document which has not been compared with the original cannot be admitted in evidence, such a copy being neither primary nor secondary evidence of the contents of the original (7 All. 738).

wrote and posted to the defendant ? If he can do so in more ways than one, state all such ways.
C. U. '08.
What kind of secondary evidence is admissible in respect of a registered sale deed in the possession of the adverse party ?
Mad. '19 (a).
What kind of secondary evidence is admissible in respect of an unregistered simple bond in the possession of a third party ?
Mad. '19 (a).
What do you understand by secondary evidence ? Is a copy transcribed from a c copy, but afterwards compared with the original, a secondary evidence ?
C. U. '24 (b).
[See ill. (c) above.]

What is meant by the expression "secondary evidence" and when may the contents of a document be proved by secondary evidence ?
 Panj. 1915.

Clause 4.—The common case of counterparts is *Pattah* and *Kabuliyat*. This clause read with the latter part of **Explanation 1** to S. 62 shows that where a document is executed in counterparts, each counterpart being executed by one or some of the parties only each counterpart is primary evidence as against the parties executing it and secondary evidence as against the other parties. A let lands to B, who sub-let to C, a raiyat. C sued for possession of a part, after an alleged dispossession, making A, a party defendant to the suit. At the hearing, C, in order to prove that the lands in dispute were part of those let to him by B, tendered in evidence the *Kabuliyat* given by him to B. *Held* that C should have produced the *pattah* given him by B, and the grant from A to B, or sufficiently account for their absence ; and that as he did not do either, the *Kabuliyat* (which was merely secondary evidence of C's *pattah*) was inadmissible even though it was produced from the possession of the landlord, A. (I C. L. R. 547).

Clause 5.—Secondary evidence includes, according to this clause, oral accounts of the contents of a document given by some person who *has himself seen the original* document. It is a condition necessary that the person giving such evidence must have seen the original himself. It will not be sufficient that he heard it being read. Moreover it must have been the *original*, not a copy. Thus, a written statement of the contents of a copy of a document, the original of which the person making the statement has not seen, cannot be accepted as an equivalent of that which this clause renders admissible, namely, an oral account of the contents of a document given by some person who has himself seen it. (7 Bom. 139).

4. Proof of documents by primary evidence.—Documents must be proved by primary evidence except in the cases hereinafter mentioned (S. 64).

5. Cases in which secondary evidence may be given of the contents of documents.—

(1) Secondary evidence may be given of the existence, condition or contents of a document in the following cases :—

(a) where the original is shown or appears to be in the possession or power of the person against whom the document is sought to be proved, or of any person out of reach of, or not subject to the process of, the court, or of any person legally bound to produce it, and when after the notice to produce it, such person does not produce it :

(b) when the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved to be admitted or by his representative in interest :

(c) when the original has been destroyed or lost or where the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time :

(d) when the original is of such a nature as not to be easily moveable :

(e) when the original is a public document

(f) when the original is a document of which a certified copy is permitted by this Act or by any other law in force in British India to be given in evidence :

(g) when the originals consist of numerous accounts or other documents which cannot conveniently be examined in Court, and the fact to be proved is the general result of the whole collection.

(2) In cases (a), (c) and (d) any secondary evidence of the contents of the document is admissible. In case (b) the *written admission* is admissible. In case (e) or (f), a *certified copy* of the document, but no other kind of secondary evidence

When and under what circumstances may secondary evidence be given?

C.U. 1901, '05, '09, '10(a), '13(b), '10(b); Bom. '09(a) & (b), '12(b), '20(b), '27(a), '26(b).

What is secondary evidence of a document admissible?

C.U. '06; Bom. '17(a). State briefly the exceptions to the rule excluding derivative or secondhand evidence and the reasons in each case for receiving the same as evidence. Mad. 1915. "Oral admis-

sions as to contents of documents are evidence." Comment. Bom. '16(a), Mad. '20(b).

State the nature of proof to be given when

the original being a record of a Court of Justice is lost in transit from the first Court to the Court of appeal, C.U. '21 (a). State the rule as to what kind of evidence is admissible in what cases, C.U. '14 (a), Mad. '18 (a). When a party proposing to give secondary evidence of the contents of a document need not comply with the provisions of S. 66 of the Evidence Act which requires previous notice to be given to the party in whose possession the document is believed to be? Punj. 1917. What are the cases in which secondary evidence may be given of the existence,

is admissible * In case (g) evidence may be given as to the general result of the documents by any person who has examined them, and who is skilled in the examination of such documents. (S. 65).

Note.—Section 64 lays down the general rule that documents must be proved by primary evidence except in certain exceptional cases and this section mentions the exceptional cases in which secondary evidence is admissible. This section is applicable to both civil and criminal cases. Secondary evidence may be given of the contents of a document in the following cases, *vis*—(a) When the document is in the possession or power of the opposite party or of any person out of the reach of, or not subjected to the process of, the Court or of any person legally bound to produce it, but who fails to produce it when required. (b) When the contents are admitted by the opposite party in writing. (c) When the original is lost or destroyed. (d) When the original is not easily moveable. (e) When the original is a public document. (f) When the document is one of which a certified copy can be used. (g) When the original consists of numerous accounts or other documents the general result of which is the fact to be proved. Some of these cases rest upon considerations which are obvious. This is the case with clauses (c) and (d). The clauses (e) and (f) are based on considerations of convenience. In the case of clause (g) it is not properly speaking secondary evidence which is admitted in substitution for the originals, but the general result as stated by a person who has examined them. The written admission in cl. (b) affords a reliable ground of truth. With regard to cl. (a) as in the case of cls. (c) and (d) the production of primary evidence is out of the party's power. (W. & A.)

* This applies only to the case in which the public document is still in existence on the public record. Where a case falls under clause (a) or (e) and also under clause (f), any secondary evidence may be received. (5 Cal. 568).

Secondary evidence of the contents of a document cannot be admitted without the non-production of the original being first accounted for in such a manner as to bring it within one or other of the cases provided for in sec. 65 of the Act (14 Cal. 486). There are cases in which secondary evidence is admissible even though the original is in existence and producible as in the case of clauses (e), (f) and (g).

[**Problem.**—A sues B for a sum alleged to be due upon a settlement of account. Instead of producing and proving the account current between himself and B, A produces evidence to prove the admission of the debt. What risks if any, does A run? C. U. 1928 (b) *See Notes under S. 22 ante*].

Clause (b).—This clause must be read with S. 22 *ante*. Under it, the *written* admission may always be proved. The *oral* admission can only be proved under the circumstances mentioned in clauses (a), (c) and (d).

Clause (c).—If the party himself neglects or makes default in taking necessary steps to cause the production of the original or if he fraudulently causes the destruction, then he is not entitled to give secondary evidence. To justify a Court for admitting a copy, there must be sufficient proof of diligent search for the original. Where the loss or destruction of the original is not satisfactorily proved, secondary evidence is inadmissible. (14 Cal. 486 P. C.)

Clause (d).—Examples of this clause are;—notice painted on a wall, inscriptions on walls and tomb-stones, "marks on boundary trees" etc. etc.

Clauses (e) & (f).—As the documents, mentioned in these clauses are little liable to corruption, alteration or misrepresentation and as the production of the same document in different places at the same time is highly inconvenient and likely to cause their destruction from frequent use, the law deems it better to allow their contents to be

condition or contents, of a document? Bom. '17 (a), 1921 (b).

When a witness not compellable to produce a document refuses to produce it, is secondary evidence of the contents admissible? Would the answer be different if the witness was bound to produce the document? Answer with reference both to the English and Indian Law. Mad. 1916. "As a general rule documents are proveable by the production of the originals alone." Explain and illustrate the principle underlying this rule. C. U. '14 (b). Give examples of the principle that no evidence shall be received which shows

on its face
that is only
derives its
force from
some other
evidence
which is
withheld.
C. U. 1908-

Is there any
degree in the
evidentiary
value of
secondary
evidence?
State the rule
as to what
kind of second-
ary evidence
is admissible
in what cases?
C.U. 1914(a),
Mad. 1918(a).
What is
secondary evi-
dence of a
document?
State the cir-
cumstances
under which
secondary evi-
dence may be
given of the
contents of a
document.
C.U. 1905(b).
In a suit for
breach of
marriage the
defendant
gave notice to
produce a
letter which
he wrote to
her on 1st
June, 1917.

proved by secondary evidence. Secs. 76-78 and 86 may be read along with clause (f).

Clause (g).—The object of this clause is to save public times. If the point to be ascertained is the balance in a long series of accounts in a merchant's book, great inconvenience would arise, and much public time will be wasted, if a witness was compellable to go through the whole of the books and to make his examination and calculations before the Court; therefore a witness who has inspected the accounts will be allowed to speak to the general result of his examination by actual facts and figures.

There is no degree of secondary evidence—The general rule is that there are no degrees in secondary evidence and that a party is at liberty to adduce any description of secondary evidence he may choose. The reason assigned is the inconvenience of requiring evidence to be strictly marshalled according to its weight; and of compelling a party, before tendering inferior evidence, to account for the absence of all which is of superior value but the very existence of which he may have no means of ascertaining. Where a party is entitled to give secondary evidence of a document under the provisions of this Act, he can give any kind of secondary evidence he chooses. Thus for instance, if an original document be lost or be in the hand of the adversary who does not produce it after notice, the secondary evidence of it may be by a certified copy or by any other copy mentioned in S. 63 or by the oral evidence of the witness who saw and read the original. Each of these kinds of secondary evidence would be equally admissible with the others. It is not necessary to exhaust the superior sources of the secondary evidence before the inferior is let in, in the same way as it is necessary to exhaust all primary evidence before any secondary evidence can be received. It is only where the law, as in clauses (d), (e), (f) and (g), of S. 65, has prescribed a particular des-

cription of secondary evidence as the only mode of proof that a restriction is placed upon the kind of secondary evidence which a party chooses to adduce.

6. (1) Rules as to notice to produce.—Secondary evidence of the contents of the document referred to in S. 65 Cl. (a) shall not be given unless the party proposing to give such secondary evidence has previously given to the party in whose possession or power the document is or to his attorney or pleader such notice to produce as is prescribed by law and if no notice is prescribed by law, then such notice as the court considers reasonable under the circumstances of the case.

Note.—The sole object of a notice to produce is to enable the adversary to have the document in Court, to produce it if he likes and if he does not, to enable his opponent to give secondary evidence thereof so as to exclude the argument that the latter has not taken all reasonable means to prove the original.

(2) Where no notice required.—But no notice shall be required in the following cases :—

- (1) When the document to be proved is itself a notice.
- (2) When from the nature of the case, the adverse party must know that he will be required to produce it.
- (3) When it appears or is proved that the adverse party has obtained possession of the original by fraud or force.
- (4) When the adverse party or his agent has the original in Court.
- (5) When the adverse party or his agent has admitted the loss of the document.
- (6) When the person in possession of the document is out of reach of or not

At the trial, the plff. does not produce the original, but wishes to read an alleged copy which she produces. What facts must she prove before this can be read in evidence? The defendant alleges that the so called copy wholly misrepresents the effect of what he wrote. What evidence can he give in support of this contention? Bom. '18 (a). When is a party entitled to give secondary evidence of a document without calling on the party in possession of the same to produce it? All. '19. State the cases in which notice to produce need not be given to render secondary evidence of the

contents of a document admissible? Bom. 1917(b).

When is the secondary evidence of the contents of a document in the possession of the adversary for the production of which no notice has been given admissible? Bom. 1916(a), 1918 (b).

How would you prove the following :—

(a) a sale-deed, (b) a mortgage-deed for 5000 rupees, (c) the inscription on a tombstone, (d) the thumb-impression on a document, (e) that Trinidad is a part of British Empire, (f) that Algeria is a part of French Empire, (g) entries in an account book regularly kept in the course of business when the maker of the entries is dead, (h) a dying declara-

tion.

subject to the process of the Court.

(7) In any other case, in which the Court thinks fit to dispense with notice. (S. 66).

7. Proof of execution of documents—(1) Proof of signature and handwriting of documents not attested.—If a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that person's handwriting must be proved to be in his handwriting. (S. 67).

Note.—Where it is alleged that a document is signed or written by any person, the signature or hand-writing of so much of that document must be proved to be the signature and hand-writing of that person. This section does not render it necessary that direct evidence of the hand-writing of the person who is alleged to have executed the deed must be given by some person who saw the signature affixed. It merely states with reference to deeds, what is the universal rule in all cases, that the person who makes an allegation must prove it. It lays down no new rule whatever as to the kind of proof which must be given. The nature of proof will depend to a large extent on the nature of the document. If it is a mere memorandum, such as the entry in a diary mentioned in S. 32 (b) it must be proved that the diary was really that of the person whose statements it is said to contain. If it is a letter, it must be shown who wrote it or at any rate, who signed it. If it be an agreement, it must be shown who executed it. (Markby). Further, the section merely requires proof of signature and hand-writing of the person alleged to have signed or written the document produced. It does not require the writer of a document to be examined as a witness nor does it require the subscribing witness to be produced. (21 W. R. 429).

As to the method of proving the signature and writing, *vide* Ss. 45, 47 and 73. As to the presumption in the case of ancient documents see sec. 90.

2. Proof of execution of documents requiring attestation—(a) If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive and subject to the process of the Court and capable of giving evidence. Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document not being a will, which has been registered in accordance with the provisions of the Indian Registration Act 1908, unless its execution by the person by whom it purports to have been executed is specifically denied. (S. 68).

Note—Sec. 90 *post* provides, for the optional presumption of due execution and attestation of a document 30 years old and consequently modifies the requirements of this section. See s. 90.

(b) If no such attesting witness can be found or if the document purports to have been executed in the United Kingdom, it must be proved (i) that the attestation of one attesting witness at least is in his hand-writing and (ii) that the signature of the person executing the document is in the hand-writing of that person. (S. 69).

Note—If no attesting witness can be found, that is, if he is dead, or is living out of the jurisdiction of the court or cannot be found after a diligent search, or if the document purports to have been executed in Great Britain and Ireland, two things must be proved:—(i) the signature of one attesting witness; and (ii) the signature of the executant.

tion formerly recorded by a Magistrate in the presence of the accused, (i) a dying declaration recorded by a Doctor in the absence of the accused, (j) dying declaration recorded by a Magistrate in the absence of the accused, All, 1916. State the provisions of the I. E. Act, governing proof of execution of documents that are required by law to be attested, C.U. 1913(a).

How will you use in evidence a document required by law to be attested? Bom. 1916(a). What is meant by an attesting witness? How is a document required by law to be attested proved? How is the same document to

be proved if the attesting witness is dead or denies attestation. All, 1920. What do you mean by an attesting witness? How can you prove the execution of a will or a mortgage-bond? C.U. 1915(b).

(c) If the attesting witness denies or does not recollect the execution of the document, its execution may be proved by other evidence. (S. 71).

Note.—Where one of the attesting witnesses to a mortgage-bond was dead at the time of the suit and the other, who was examined stated that he attached his signature to the document without knowing what it was and without witnessing its execution, then, the plaintiff is entitled, under this section to prove its execution and attestation by other evidence. So far as this section is concerned, execution includes attestation. (1 Pat. 154) Similarly, when the attesting witnesses to a mortgage-deed state that they signed the blank paper and not the completed deed, the mortgagee is entitled to prove execution by evidence other than that of the attesting witnesses, under this section. (48 I. C. 624). When the only living attesting witness it was won over by the opposite party and in cross-examination denied the clear evidence he gave in examination-in-chief about execution and attestation; *held* that the court may act upon the sworn evidence given by the witness in examination-in-chief. (1921 M. W. N. 747)

(d) The admission of a party to an attested document of its execution by himself shall be sufficient proof of its execution as against him, though it be a document required by law to be attested. (S. 70).

Note.—This section serves as a proviso to S. 68 because when the party by whom the document was executed admits in court the fact of its execution, then there is no necessity to call an attesting witness to prove its execution. The admission here spoken of relates only to the *execution*. It must be distinguished from the admission in S. 22 *ante* and from that mentioned in S. 65 (3) *ante* which relate to the *contents* etc. of a document.

The word "admission" in this section refers only to an admission of a party in the course of proceedings in which the attested document is produced, made, for example, in the pleadings or by the party in his examination. (38 All. 1)

It has no relation to any evidential admission made before and sought to be proved by, witnesses in a suit (27 Cal. 190)

[But see 4 Pat. L. J. 511, where it has been *held* that the admission may be made antecedent to the institution of legal proceedings. See also 1 C. W. N. 222 notes and 77 l. C. 362]. The certificate of admission of execution

endorsed by the Registering officer cannot be used as an admission of execution within the meaning of this section.

(*Ibid*) An admission by a representative of a party to an attested document of its execution by the party is not an admission by the party himself within the meaning of this section (38 C. L. J. 114). The admission of execution of an attested document by the executant is sufficient proof

of its execution only against the person making such admission ; as against other parties in the suit, who do not admit such execution, the document must be proved according to

Ss 68-70 of the Evidence Act. (44 Cal. 345 ; 22 C. W. N. 444 ; 2 Pat. 317. *Contra* : 7 C. N. N. 384). Admission in this section means admission of a party to a document which is on the face of it a duly attested document. The execution of

a document means something more than mere signing by the party and includes delivery and signing in the presence of witnesses where witnesses are necessary. Thus where the admission of signature is coupled with an express denial

that the document was signed in the presence of the attesting witness it is not an admission of due execution within the meaning of this section and the attesting witness must be called to prove the document. The word used in S. 70 is

"execution" and not "signature" which is used in S. 69 (36 L. J. 373 ; 38 C. L. J. 114 ; 27 C. W. N. 144). An admission to be effectual under this section must be *unqualified*. In

A sues B on a registered mortgage-bond, which on the face of it, is duly signed by B and attested by two witnesses, B admits signature, but denies execution in the presence of attesting witnesses. The attesting witnesses being dead, none of them is called. Can A rely on B's admission as sufficient ?

C. U. 1928(b).

other words, the admission must amount to an acknowledgment of the formal validity of the instrument. (*Ibid*). There is no reason for holding that where a party admits execution within S. 70, he must necessarily be taken to admit that the document has been attested as required by law. (47 Bom. 137) Where, however, the admission of execution is *unqualified* i. e. an admission pure and simple, capable of being construed as an admission of due execution in the presence of the attesting witnesses, it dispenses with proof under S. 70. (27 C. W. N. 144).

In *Jogendra v Nitai* (7 C. W. N. 384) it has been held that the only effect of S. 70 is to make the admission of the executant sufficient proof of *execution* and that the section is not sufficient to dispense with the necessity of proof of *attestation* to make a mortgage valid under S. 59 T. P. Act. But the correctness of this decision has been doubted in 44 All. 127. See also Woodroff's Evidence Act, 536 (8th Ed). But see 30 C. W. N. 364 P. C.; 45 C. L. J. 577 and 104 I. C. 386 : S. 70 cannot and does not, by admission of execution, render valid document which is invalid in law. Thus where the execution of a mortgage-bond is admitted, but it is not duly attested, it is invalid. Before the admission of execution under S. 70 can be relied upon, it must be proved to be a document *duly attested*. The authority of *Jogendra v. Nitai* (*supra*) has been restored and the contrary rulings have been superseded by the P. C. decision in 30 C. W. N. 364 (*supra*). (Sarkar, 470.)

The provision of this section is at variance with the English rule, according to which the attesting witness must be called, even although the deed be one, the execution of which is admitted by the party to it (Taylor, S. 1843 ; W. & A. 535)

(c) An attested document not required by law to be attested may be proved as if it was unattested. (S. 72).

Note.—Where a document is required by law to be attested it shall not be received as evidence until its exe-

cution is proved. Attestation of a document is a common formality and in some cases imperative. The object with which it is made or required is to afford proof of the genuineness of the document. It is clear that the provisions of the law prescribing attestation would be defeated if a document required to be attested were allowed to be used in evidence otherwise than in accordance with the provisions of sections 68-71. Secs. 68-71 apply only to documents required by law to be attested. Where, however, attestation is optional a party is free to give such evidence as he pleases, the case not being one in which the law has required a particular form of proof.

Documents requiring attestation.—Documents required by law of this country to be attested are the following :—(1) A deed of gift of immoveable property. (S. 123, Transfer of Property Act). (2) A deed of mortgage, the principal money secured by which is Rs. 100 or upwards. (S. 59, T. P. Act.) (3) Wills made by persons other than Mahomedans (S. 58, Indian Succession Act, 1925.) (4) Wills made by Hindus, Jains, Sikhs and Buddhists. [S. 57 (2), I. S. Act, 1925 & S. 2 H. W. Act].

[A distinction is observed in the Act between documents required by law to be attested and those not so required. In the case of the former the document is not admissible in evidence, unless its execution is proved under Ss. 68-71, while in the case of the latter, it may be proved under S. 67, as also with the help of Ss. 45, 47 and 73].

Attestation.—To attest means to bear witness to a fact. An attesting witness is a witness who has seen the deed executed and who signs it as a witness. Where an instrument is required to be attested, the meaning is that the witness shall be present at its execution and shall testify that it has been executed by the proper person.

Execution.—Execution of a document means signing, sealing and delivery of it. The term may be defined as a formal completion of a deed.

To sum up.—The rules with regard to the proof of attested documents may be thus summarised :—

(1) An attested document not required by law to be attested may be proved as if it was unattested (S. 72).

(2) The Court *shall* presume that every document called for and not produced was attested in the manner required by law. (S. 89).

(3) There is a presumption of due attestation in the case of a document thirty years old. The Court *may*, in such a case, dispense with proof of attestation. (S. 90).

(4) When a document is required by law to be attested and there is an attesting witness available, at least one attesting witness must be called. (S. 68).

(5) If there is no attesting witness available or if the document purports to be executed in the United Kingdom, the attestation of at least one attesting witness and the signature of the person executing the deed must be proved by other evidence to be in their handwriting. (S. 69)

(6) The admission of a party to the document will, so far as such party is concerned, supersede the necessity either of calling the attesting witnesses or of giving any other evidence. (S. 70).

(7) If the attesting witness denies or does not recollect the execution of the document, its execution may be proved by other evidence. (S. 71).

Comparison of signature, writing or seal with others admitted or proved. When the genuineness of a letter is in dispute, what are the various kinds of

(3) In order to ascertain whether a signature, writing or seal is that of the person by whom it purports to have been written or made, any signature writing or seal admitted or proved, to the satisfaction of the Court, to have been written or made by the person may be compared with the one which is to be proved, although that signature, writing or seal has not been produced or proved for any other purpose. The Court may also direct any person present in the court to write any words

or figures for the purpose of enabling the Court to compare the words or figures so written with any words or figures alleged to have been written by such person. (S. 73).

evidence that may be laid before the Court to prove the handwriting ?
Bom. 1914(b)

(This section applies also, with any necessary modifications, to finger impressions.)

Note.—This section, in addition to the modes of proving handwriting under Ss. 45 and 47 provides for another mode of proving handwriting by direct comparison of the disputed writing made by the Court with the undisputed or admitted writing of the party. The Evidence Act thus provides four modes of proving handwriting *vis*—

- (1) By proof of signature and handwriting of the person alleged to have signed or written the document. (S. 67).
- (2) By the opinion of experts who can compare handwriting. (S. 45).
- (3) By a witness who is acquainted with the handwriting of the person who is supposed to be the writer of the document in question. (S. 47).
- (4) By a comparison made by the Court of signature, writing or seal with others admitted or proved. (S. 73).

Whatever may be the relative values of the several modes of proof of handwriting when compared with each other, it is certain that all such proof is, even in its best form, precarious and often extremely dangerous. Many persons write alike, having the same teacher, writing in the same office, being of the same family ; all these produce similitude in hand-writing, which in common cases, and by common observers, is not liable to be distinguished. The handwriting of the same person varies at different periods of life, it is affected by age, by infirmity, by habit. Standing alone, any of the modes of proof of handwriting by resemblance are worth little, in a criminal case, nothing. (Best).

8. (a) Classification of documents.—Documents are of two kinds, (1) *public* and (2) *private*.

Public documents.
Explain :—
Public document.
C. U. 19 (a),
Bom. 1917(a).

(b) Public documents.—The following documents are public documents :—

(1) Documents forming the acts or records of the acts—

(i) of the sovereign authority,

(ii) of official bodies and tribunals,

(iii) of public officers, legislative, judicial and executive, whether of British India or of any other part of His Majesty's dominions or of a foreign country;

(2) public records kept in British India of private documents.

(c) Private documents.—All other documents are private documents.

Private documents.
What are public documents? How can the contents of a public document be proved when the original cannot be produced?
C. U. '16 (b),
'14 (a), '02;
Bom. '19 (b),
Mad. '18 (a).

9. Proof of public documents.—Certified copies may be produced in proof of the contents of the public documents, or parts of the public documents, of which they purport to be copies. (S. 77)

May.—By the use of the word "may" in this section an option has been given to the party to prove the contents of the public document either by the production of the original or by certified copies.

The mode of proving *private* documents is regulated by the general provisions of the Act relating to documentary evidence contained in sections 61-73 while the special mode of proof applicable in the case of *public* document is laid down in Ss. 76-78.

What documents are public and how may they be proved?
C. U. '16 (a).
The defence to a suit is that the trial of certain issues raised in it is barred

10. How certified copies to be procured.—Every public officer having the custody of a public document, which any person has a right to inspect, shall give that person on demand a copy of it on payment of the legal fees therefor, together with a certificate written at the foot of such copy that it is a true copy of such document or part thereof, as

the case may be, and such certificates shall be dated and subscribed by such officer with his name and his official title, and shall be sealed, whenever such officer is authorized by law to make use of a seal and such copies so certified shall be called certified copies. (S. 76).

by a previous judgment. How may the contents of the judgment be proved? C. U. 1909.

Note.—Any officer who, by the ordinary course of official duty, is authorized to deliver such copies shall be deemed to have the custody of such documents within the meaning of this section. (Expl. to S. 76).

Section 65 lays down that public documents may be proved by certified copies. Provision is made in S. 76 for securing these certified copies by the enactment that every public officer having custody of a public document which a person has a right to inspect, shall give that person, on demand and on payment of the legal fees, a copy signed and sealed together with a certificate that it is a true copy of the document. (Cunningham.)

This section applies to that class of public documents which a person has right to inspect and thus saves and excludes all such documents as the Government has right to refuse to show on the ground of State policy, privileged communication etc.

11. Special modes of proving certain public documents.—The following public document may be proved as follows :—

(1) Acts, orders or notifications of the Executive Government of British India in any of its departments, or of any Local Government or any department of any Local Government—

(a) by the records of the department, certified by the heads of those departments respectively, or

(b) by any document purporting to be printed by order of any such Government.

(2) The proceedings
of the Legislatures—

(a) by the journals of
those bodies respectively,
or

(b) by the published
Acts or abstracts, or

c) by copies purport-
ing to be printed by order
of Government.

(3) Proclamations,
orders or regulations
issued by His Majes-
ty or by the Privy
Council or by any
department of His
Majesty's Govern-
ment—

by copies or extracts con-
tained in the London
Gazette or purporting to
be printed by the King's
Printer.

(4) The Act of the
Executive or procee-
dings of the Legis-
lature of a foreign
country—

(a) by journals pub-
lished by their authority
or commonly received in
that country as such, or

(b) by a copy certified
under the seal of the
country or sovereign, or

(c) by a recognition
thereof in some public Act
of the Governor General
of India in Council.

What kind of
secondary
evidence is
admissible in
respect of the
judgment of a
foreign court?
Mad. 1919(a).

(5) The proceedings
of a municipal body
in British India—

(a) by a copy of such
proceedings, certified by
the legal keeper thereof,
or

(b) by a printed book
purporting to be published
by the authority of such
body.

(6) Public documents of any other class in a foreign country—

(a) by the original, or
(b) by a copy certified by the legal keeper thereof with a certificate under the seal of a Notary Public or of a British Consul or diplomatic agent, that the copy is duly certified by the officer having the legal custody of the original, and upon proof of the character of the document according to the law of the foreign country.
(S. 78).

How may the judgment of a foreign tribunal be proved in Br. India? Mad. 1918(a); Bom. 1921(b).

Note.—Besides the certified copies, there are special ways of proving certain public documents which are pointed out in Sec. 78.

12. Presumptions as to documents : (Ss. 79-90).—One important branch of the proof of documents consists of certain presumptions, which the law authorises in respect of them. These presumptions are enumerated in the following sections (79-90). Sections 79-85 and 89 provide for cases in which the Court *shall presume* certain facts about documents, that is, the court is bound to accept those facts as proved until they are disproved. Sections 86-88 and 90 provide for cases in which the Court *may presume* certain facts about documents, that is, the Court is at liberty either to accept those facts as proved until they are disproved or to call for proof of them in the first instance.

(1) Presumption as to genuineness of certified copies.—(i) The Court *shall presume* every document purporting to be a certificate, certified copy or other document which is by law declared to be admissible as evidence of any particular fact and which purports to be duly certified by any

Give a brief list of the documents which the Court is bound to presume to be genuine or

accurate,
Bom. 1907(a).

officer in British India or by any officer in any Native state in alliance with His Majesty, who is duly authorized thereto by the Governor-General in Council, to be genuine: *Provided* that such document is subsequently in the form and purports to be executed in the manner directed by law in that behalf.

(ii) 'The Court shall also' presume that any officer by whom any such document purports to be signed or certified, held, when he signed it, the official character which he claims in such paper (S. 79).

Note.—The presumption referred to in this section is not conclusive but rebuttable. It is but a *prima facie* presumption and if the certificate etc. be not correct its incorrectness may be shewn or if the officer by whom such document purports to be signed or certified does not hold the official character which he claims in such paper, evidence may be given by the opposite party to show that the certificate, certified copy, or other document is not genuine and that the officer does not hold the official character which he claims.

The terms of S. 114 are only permissive; but S. 79 imperatively directs the Judge to raise the presumption though evidence to rebut it is of course admissible. The words "shall presume" indicate that if no other evidence is given the Court is bound to find that the facts mentioned in the section exist.

What facts
can the Court
presume with
regard to a
document pro-
duced before
a Court pur-
porting to be
a confession
made by an

(2) **Presumption as to document produced as record of evidence.**—Whenever any document is produced before any Court, purporting to be a record or memorandum of the evidence, or of any part of the evidence, given by a witness in a judicial proceeding or before any officer authorized by law to take such evidence or to be a statement or confession by any prisoner or accused

person, taken in accordance with law, and pur-
 porting to be signed by any Judge or Magistrate,
 or by any such officer as aforesaid the Court *shall*
 presume—

accused
 person and
 signed by a
 Magistrate?
 C.U. 1924(b).

- (i) that the document is genuine :
- (ii) that any statement as to the circumstances
 under which it was taken, purporting
 to be made by the person signing it,
 are true, and
- (iii) that such evidence, statement or confession
 was duly taken. (S. 80).

Note.—The presumption to be raised under this section
 are considerably wider than those under S. 79. They
 embrace not only the genuineness of the document but that
 it was duly taken and given under the circumstances record-
 ed therein.

When a deposition or confession is taken by a public
 officer, there is a degree of publicity and solemnity which
 affords a sufficient guarantee for the presumption that
 everything was formally, correctly and honestly done.

The presumption under this section are not conclusive
 but rebuttable and evidence may be adduced to rebut the
 presumptions.

**(3) Presumption as to Gazettes, news-
 papers, private Acts of Parliament and other
 documents.**—The Court *shall* presume the genui-
 ness of every document purporting to be the London
 Gazette or the Gazette of India, or the Government
 Gazette of any Local Government or of any colony,
 dependency or possession of the British Crown, or
 to be a newspaper or journal, or to be a copy of a
 private Act of Parliament printed by the Queen's
 Printer and of every document purporting to be
 a document directed by any law to be kept by any
 person, if such document is kept substantially in

the form required by law and is produced from proper custody. (S. 81)

Note.—The section declares Gazettes etc. to be *prima facie* proof of their genuineness, which is liable to be rebutted according to the explanation of the expression "shall presume" in S. 4 *supra*.

As to the relevancy of statements in Gazettes etc. *vide* S. 37. The second part of this section includes most of the documents which contain matters referred to in S. 35 and which are declared public documents under S. 74.

Proper custody.—*Vide* notes under S. 90 *infra*.

(4) Presumption as to document admissible in England without proof of seal or signature.—When any document is produced before any Court, purporting to be a document which by the law in force for the time being in England or Ireland, would be admissible in proof of any particular in any Court of Justice in England or Ireland, without proof of the seal or stamp or signature authenticating it or of the judicial or official character claimed by the person by whom it purports to be signed, the Court *shall* presume (a) that such seal, stamp or signature is genuine, and (b) that the person signing it held, at the time when he signed it, the judicial or official character which he claims, and the document shall be admissible, for the same purpose for which it would be admissible, in England or Ireland (S. 82)

Note.—Documents which, without proof of the seal or signature or of the official character of the person by whom they purport to have been signed, are admissible in England or Ireland, will be admissible in British Court in India.

What facts
can the Court
presume with
regard to a

(5) Presumption as to maps or plans made by authority of Government.—The Court *shall* presume that maps, or plans purporting to be made by the authority of Government were so made, and

are accurate ; but maps or plans made for the purposes of any cause must be proved to be accurate. (S. 83.)

Note.—This section dispenses with the proof of the execution and accuracy of original maps or plans made by the authority of Government for public purposes. Under the concluding words of the section no presumption will arise regarding maps or plans prepared *for the purpose of a particular cause*. Such maps are not prepared for public purposes ; therefore, their accuracy cannot be presumed under this section, but must be proved.

Sec. 36 declares that maps or plans prepared under the authority of Government, are relevant ; and their contents may be proved under S. 77 and 79 by the production of certified copies.

(6) Presumption as to collections of laws and reports of decisions.—The Court *shall* presume the genuineness of every book purporting to be printed or published under the authority of the Government of any country, and to contain any of the law of that country, and of every book purporting to contain reports of decisions of the Courts of such country. (S. 84).

Note.—This section should be read with Sec. 38, *ante*. It dispenses with the proof of the genuineness of authorised books of any country containing laws and reports of decision of Courts. Sec. 57 empowers the Courts to take judicial notice of laws and statutes in British India and in the United Kingdom.

(7) Presumption as to powers of attorney.—The Court *shall* presume that every document purporting to be a power-of-attorney, and to have been executed before, and authenticated by a Notary Public or any Court, Judge, Magistrate, British Consul or Vice-Consul, or representative of

map or plan purporting to be made by the authority of Govt ? C. U. '24(b), 1918 (a), '25 (b), 27(b). What is the nature of the presumption that arises under the Evidence Act with regard to maps, and plans purporting to be made by the authority of Government and not for the purpose of any case ? C. U. 1904. In what cases are statements in maps, charts and plans relevant under Sec. 36 of the Evidence Act, and in what cases are such maps, or charts to be presumed accurate and in what cases not ? C. U. 1911 (a).

His Majesty or of the Government of India, was to executed and authenticated. (S. 85.)

Note.—The fact of execution before and authentication by, persons of the position and office of those in the section mentioned affords a guarantee and *prima facie* proof of such execution and authentication respectively.

The words "shall presume" indicate that the section is mandatory.

"Authentication" means attestation of a document by legally authorized persons after being satisfied with the identity and execution by the executant.

What is the nature of the presumption as to a document called for and not produced without sufficient cause after notice to produce it ?
C. U. 1904.

(8) Presumption as to due execution etc., of documents not produced.—The Court shall presume that every document called for and not produced after notice to produce, was attested, stamped and executed in the manner required by law. (S. 89).

Note.—This section lays down that when a document is called for and not produced after proper notice to do so, the court shall presume that it was duly attested, stamped and executed in the manner prescribed by law.

This section refers only to *stamp, execution and attestation* of documents; the presumption does not extend to its *contents* which must be proved by secondary evidence [*Vide* S. 65 (a)] The presumption arising under this section is not optional but imperative, as the words "*shall presume*" have been used.

(9) Presumption as to certified copies of foreign judicial records.—The Court may presume that any document purporting to be a certified copy of any judicial record of any country not forming part of His Majesty's dominions is genuine and accurate, if the document purports to be certified in any manner which is certified by any representative of His Majesty or of the Government of

India in or for the certification of copies of judicial records. (S. 86).

Note.—This section lays down that if a copy of a foreign judicial record purports to be certified in a given way, the court *may* presume it to be genuine and accurate. It, however, does not exclude other modes of proving certified copy of foreign judicial record.

This section as well as Ss. 87, 88 and 90 deal with optional presumptions ("may presume") as defined in the first para of S. 4.

An officer who, with respect to any territory or place not forming part of His Majesty's dominions, is a political Agent therefor, as defined in section 3, clause (40) of the General Clauses Act, 1897, shall for the purposes of this section, be deemed to be a representative of the Government of India in and for the country comprising that territory or place.

(10) Presumption as books, maps and charts.—The Court *may* presume that any book to which it may refer for information on matters of public or general interest, and that any published map or chart, the statements of which are relevant facts and which is produced for its inspection, was written and published by the person and at the time and place, by whom or at which it purports to have been written or published. (S. 87).

Note.—Under this section the Court *may* presume that any book to which it may refer for information on matters of public or general interest and that any published chart or map was written and published by the person and at the time and place by whom or at which it purports to have been written or published. *Vide* Ss. 36 and 83.

(11) Presumption as to telegraphic messages.—The Court *may* presume that a message forwarded from a telegraph office to the person to whom such message purports to be addressed corresponds with a message delivered for trans-

What facts can a Court presume without proof with regard to any published map or chart, the statements of which are relevant facts and which is produced for the Court's inspection? C.U. 1918(a).

State briefly the provision of the I. E. Act with reference to

telegraphic
message and
ancient docu-
ments.
C. U. 1903.

mission at the office, from which the message purports to be sent, but the court shall not make any presumption as to the person by whom such message was delivered for transmission. (S. 88).

“But the Court shall not make etc.”—The reason of this is obvious : any person may send any message in the false name, so the presumption as to the identity of person should not be made. (Sarkar).

What facts
can a Court
presume with-
out proof,
with regard
to any
document
more than 30
years old
which is pro-
duced from
proper cus-
tody ?
C.U. '18 (a)
'04 ; Bom.
'16 (b).

How should
ancient docu-
ments be
proved ?
C.U. '14 (a).
“Documents
thirty years
old are said to
prove them-
selves”
Discuss.
C. U. 21 (b).
“Although
documentary
evidence may
not be receiv-
able for want
of being ver-
ified on oath
or its equi-
valent or
traceable to

(12) **Presumption as documents thirty years old.**—Where any document purporting or proved to be thirty years old is produced from any custody which the Court in the particular case considers proper, the Court *may* presume that the signature and every other part of such document, which purports to be in the handwriting of any particular person, is in that person's handwriting and in the case of a document executed or attested, that it was duly executed and attested by the persons by whom it purports to be executed and attested. (S. 90).

Explanation.—Documents are said to be in “proper custody” if they are in the place in which, and under the care of the person with whom, they would naturally be ; but no custody is improper if it is proved to have had a legitimate origin, or if the circumstances of the particular case are such as to render such an origin probable. (Ibid).

Note.—This section provides that where a document is or purport to be more than 30 years old, if it be produced from what the court considers to be proper custody, it *may* be presumed that it was executed and attested by the parties whose signature it bears. (31 W. R. 45). This section is based on the ground that after 30 years, it cannot be expected to produce the attesting witnesses or executants as time may have removed the witnesses, who could prove these facts. As years go on, the witnesses who can personally

speak to the attestation or execution of a document or to the handwriting of those who executed or attested it gradually die out. If strict proof of execution or handwriting were necessary, it would, after a generation become impossible to prove any document. It is on account of necessity, therefore, that the presumption is to be made in favour of ancient documents. Proof of custody is required as a condition of admissibility to afford the court reasonable assurance of the genuineness of the document as being what it purports to be.

Scope of the section.—This section in no way touches the question of *relevancy* of a document, but deals only with the amount of credit which is to be attached to certain documents whose age and custody raises a presumption of genuineness. It does away ordinarily with the necessity of proving these documents. For documents thirty years old are said to prove themselves, that is, no witness need, unless the Court so requires, be called to prove their execution or attestation.

The presumption of genuineness is confined to *hand-writing, execution and attestation* and not to any other collateral matter which do require independent proof. (11 Bom. 68)

Although ancient documents are admissible in evidence on proof that they have been produced from proper custody, their value as evidence when admitted must depend in each case upon the corroboration derivable from internal circumstances, *e. g.* from the documents having been produced on previous occasions upon which they would naturally have been produced, if in existence at the time or from acts having been done under them (9 C. R. 425).

May presume.—The expression "may presume" indicates that the presumption allowed by this section is not a presumption which the Court is bound to make and the court may require the document to be proved in the ordinary

against whom it is offered, the benefit of its permanence is not always lost to justice."

Discuss.

C. U. 21 (b). State the provision of the I. E. Act regarding presumption as to documents 30 years old. Bom. 16 (b), 19 (b); C. U. 203; All. 20.

Explain—Ancient documents, and Proper custody.

C. U. 14 (a).

Explain and

illustrate :—

"Ancient document,"

C. U. 19 (a).

"Documents

thirty years

old prove

themselves."

Explain its

meaning and

application.

C. U. 25 (b),

27 (b), 27 (a).

way. If there are circumstances in the case which throw great doubt on the genuineness of a document more than 30 years old, even if it is produced from proper custody, the Court may exercise its discretion by not admitting that document in evidence without formal proof and reject it when no such proof is given.

Proper custody.—The proper custody of a document means its deposit with a person and in a place where, if authentic, it might naturally and reasonably be expected to be found, (Taylor). It is not necessary that the document should be found in the best and the most proper place of deposit.

Sec. 90 read with the explanation attached thereto, seems to insist only on a satisfactory account of the origin of the custody, and not on the history of the continuance. Possibly the origin of the custody was alone regarded as material because it is intelligible that ancient documents may be overlooked and left undisturbed notwithstanding a transfer of old, or creation of new, interest.

Thirty years old.—The period of thirty years is to be reckoned from the date appearing on the document up to the date on which the document having been tendered in evidence, its genuineness becomes the subject of proof (5 C. L. R. 135).

Secondary evidence.—The presumption allowed by the section may be applied where the original document sought to be proved has been destroyed and only secondary evidence of its contents in the shape of a certified copy is available. (22 All. 294). If a document is shown to have been lost in proper custody, and to be more than 30 years old, secondary evidence of its contents may be given under S. 65 cl. (c) and this section without proof of execution (3 Cal. 356)

CHAPTER VI. — Exclusion of Oral by Documentary Evidence (Ss. 91 100).

This Chapter treats of two important questions with regard to documentary evidence, namely :—(I) *How far, and in what cases, oral evidence is excluded by documentary evidence ?* (II) *How far, and in what cases, oral evidence may be given to aid in the interpretation of documents ?*

1. Exclusion of Oral by Documentary evidence.—It has already been provided by the Act that the *contents* of all documents must be proved by the production of the document itself, except in those cases in which secondary evidence is admissible (Ss. 64 & 65). If, however, the question is not primarily as to the *contents* of a document but as to the existence of matters of fact of which the documents form the record and proof, the question arises whether the fact of such record excludes other evidence of the matters which are recorded and whether those matters can, and if so, in what manner, be affected by such other evidence.* As to this there are two cardinal rules, *vis.*—

1. Proof of terms of contracts, grants and dispositions of property reduced to documentary form—(a) Where the terms of a contract or of a grant or of any other disposition of property, have been reduced to the form of a document, and (b) in all cases in which any matter is required by law to be reduced to the form of a document,—no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained. (S. 91).

Thus, if a contract is contained in a bill of exchange the bill of exchange must be proved.

“What is in writing shall only be proved by the writing itself.” Are there any exceptions to this rule ?
C. U. '28 (b)

Explain fully the provisions of S. 91 with exceptions and provisos.
Bom. '19 (a).

*. See Woodroff's Evidence, p. 331 (5th Ed.)

N. B. (1) This section applies equally to cases in which the contracts, grants or dispositions of property referred to are in one document and to cases in which they are contained in more documents than one : (Expl. 1).

Thus, if a contract is contained in several letters all the letters in which it is contained must be proved.

(2) Where there are more originals than one, one original only need be proved (Expl. 2).

Thus, if a bill of exchange is drawn in a set of three, only one need be proved.

(3) The statement, in any document whatever, of a fact other than the facts referred to in this section, shall not preclude the admission of oral evidence as to the same fact. (Expl. 3).

Illustrations—(d) A contracts in writing with B, for the delivery of indigo upon certain terms. The contract mentions the fact that B has paid A the price of other indigo contracted for verbally on another occasion. Oral evidence is offered that no payment was made for the other indigo. The evidence is admissible. (e) A gives B a receipt for money paid by B. Oral evidence is offered of the payment. The evidence is admissible.

Note.—It is a cardinal rule of evidence not one of technicality but of substance, which it is dangerous to depart from—that where written documents exist, they shall be produced as being the best evidence of their own contents. When a transaction has been reduced to writing either by agreement of the parties or by requirement of law, the writing becomes the exclusive memorial thereof and no evidence shall be given to prove the transaction, except the document itself or secondary evidence of its contents where such evidence is admissible.

The above general rule may be briefly expressed by saying that extrinsic evidence is inadmissible to ~~show~~ a

document. The section is based upon the principle that the best evidence of which the case in its nature is susceptible, should always be produced. It is a general and most inflexible rule that whenever written instruments are appointed, either by the requirements of law or by the compact of parties to be the repositories and memorials of truths, any other evidence is excluded from being used either as a *substitute* for such instruments (S. 91) or to *contradict or alter* them (S. 92). This is a matter both of principle and policy; of principle, because such instruments are, in their own nature and origin, entitled to a much higher degree of credit than parol evidence; of policy, because it would be attended with great mischief if those instruments upon which men's rights depended were liable to be impeached by loose collateral evidence. Sir James Fitz-James Stephen in his *Introduction to the Evidence Act* observes: "One single principle runs through all the propositions relating to documentary evidence. It is that the very object for which writing is used is to perpetuate the memory of what is written down, and so to furnish permanent proof of it. In order that full effect may be given to this, two things are necessary, namely, that the document itself should, whenever it is possible, be put before the Judge for his inspection and that if it purports to be a final settlement of a previous negotiation, as in the case of a written contract, it shall be treated as final and shall not be varied by word of mouth. If the first of those rules were not observed the benefit of writing would be lost. There is no use in writing a thing down unless the writing is read. If the second rule were not observed people would never know when a question was settled, as they would be able to play fast and loose with their writings."

Scope of the section.—The section provides two things, namely—

(a) *If the terms of a contract, or of a grant, or of any*

other disposition of property have been reduced to the form of a document,—no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, except the document itself etc. (8) *In all cases in which any matter is required by law to be reduced to the form of a document*,—no evidence shall be given in proof of such matter except the document itself etc.

The first provision refers to transactions voluntarily reduced to writing. Thus where a compromise is reduced to writing, no extraneous evidence regarding the terms of the compromise is admissible. (29 I. C. 838). Similarly, where a person has signed a written contract he cannot let in oral evidence to show that he contracted only as an agent. (45 Bom. 1242 ; 5 B. L. R. 234, 242, 243). The consequence of this rule sometimes proves fatal to a litigant ; for instance, where a party bases his claim on a document which is inadmissible for want of registration or for a like cause he is without any remedy, because he can neither use the inadmissible document nor can resort to parol evidence which is excluded under this section. (Banerjee's Ev. 469) See also Author's Indian Law of Registration, p. 117 *et seq.*

If the parties have intended to reduce *all* the terms of the contract into writing, then no parol evidence is admissible, but if they intended *only* to reduce into writing a *portion* of the terms of the contract, then they are entitled to give parol evidence of the terms which they did not intend to reduce into writing. (7 Cal. 176).

The second provision refers to those cases in which any matter is required by law to be reduced to the form of a document *e.g.* gifts of immoveable property, sale and exchange of tangible immoveable property of the value of Rs. 100 and upwards and of a reversion or other intangible thing, lease of immoveable property from year to year or for any term exceeding one year or reserving a yearly rent, mortgage when the principal sum secured is Rs. 100 or

upwards, transfer of actionable claims, agreements made without consideration, acknowledgment of liability under S 19 of the Limitation Act, contracts for reference to arbitration, trusts of immoveable and (except in cases where the ownership of the property is transferred to the trustee) of moveable property, wills except those which may be made orally under the Succession Act, confessions of accused persons, the deposition of witness etc., etc. This section does not apply to a dying declaration or to a statement made to an investigating police as it is not such a matter as is required by law to be reduced to the form of a document. (36 Cal. 659; 6 I C. 101; 25 I C. 321). But the confession of an accused made to a Magistrate holding an enquiry is a matter which must be reduced to writing; therefore no other evidence of the terms of the confession can be given except the record of the confession (19 I. C. 307; 35 All. 260).

Expl. (3)—In this section the facts referred to are :—
 (1) *The terms of a contract or* (2) *of a grant or* (3) *of any other disposition of property.* If a document relates exclusively to something other than any of those three kinds of facts mentioned in the section, as for instance, if it be a simple receipt, as in ill. (e) at p. 228 or if it relates to some other independent fact, as for instance, the payment of the consideration money, as in ill. (d) at p. 228 the fact of the payment may be proved orally as well as by writing. It is a fact independent of the contract. The consideration for a contract is not one of its terms within the meaning of S. 91 and evidence may therefore be given of such consideration (33 Cal. 607).

In a suit for rent the tenant tenders witness to prove payment of rent without producing receipts given by the plff. or proving their loss. Is oral evidence admissible to prove payment of rent? C. U. '21 (b).

Where the contents of any document are in question either as a fact in issue or as a subaltern principal fact, the document is proper evidence of its own contents, and all derivative proof is rejected until its absence is accounted for. But where a written instrument or document of any descrip-

tion is not a fact in issue, and is merely used as evidence to prove some fact independent proof *aliunde* is receivable. Illustrations (d) and (e) give examples of matters, the mention of which, in a document, does not preclude their proof *aliunde*; in (d), because the fact mentioned is not one of the terms of the contract, in (e), because the memorandum or receipt is not a "contract, grant or disposition of property" and therefore no mention of any fact in a receipt interferes with its being proved in any other manner. According to ill. (e) the payment acknowledged in a receipt may be proved either by the receipt or by oral evidence, and the reason of this rule is that the existence of the receipt forms no part of the fact to be proved, and that the receipt itself is nothing more than collateral or subsequent memorial of that fact, affording a convenient and satisfactory mode of proof. (33 Mad. 53).

This section prevents only the terms of a contract, grant or disposition of property which have been reduced to writing from being proved by oral evidence but not the fact of the contract itself which can be proved orally. (4 I. C. 314). Thus although a receipt has been given for the payment of money proof of the fact of payment may be made by any person, who witnessed it, (Banerjee's Evidence 469). Taylor reduces to three classes the cases falling under the rule which requires the contents of a document to be proved by the document itself, if its production be possible, namely—I. Oral evidence cannot be substituted for any *instrument which the law requires to be in writing*. II. Oral evidence cannot be substituted for the written evidence of any *contract which the parties have put in writing*, III. Oral evidence can not be substituted for any writing, *the existence or contents of which are disputed* and which is *material to the issue* between the parties and is not merely the memorandum of some other fact. (Field, 262).

Exceptions.—The general rule laid down in S. 91 is, however, subject to the following exceptions* :—

(1) When a public officer is required by law to be appointed in writing, and when it is shown that any particular person has acted as such officer, the writing by which he is appointed need not be proved.

It is a general principle that a person's acting in a public capacity is *prima facie* evidence of his having been duly authorized so to do and even though the office be one the appointment to which must have been in writing, it is not at least in the first instance, necessary to produce the document on account for its non-production.

(2) Wills admitted to probate in British India may be proved by the probate.

Probate means a copy of a will certified under the seal of a Court of competent jurisdiction, with a grant of administration to the estate of the testator. Probate of a will is evidence of the contents of the will against all the parties interested thereunder.

How can a will admitted to probate be proved when the original cannot be produced? C.U. 1914(a).

2. Exclusion of evidence of oral agreement.—When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted *as between the parties to any such instrument or their representatives in interest* for the purpose of contradicting, varying, adding to or subtracting from, its terms† : (S. 92).

Explain fully the provision of S. 92 with exceptions and provisos. Bom. 1919 (a).

State what you know as to the law relating to the exclusion of oral by documentary evidence. All. 1917..

* The general rule laid down in S. 91 is also subject to the exceptions embodied in Ss. 95 and 97 *infra*.

† This section applies only where on the face of it, the written instrument appears to contain the whole contract. If the parties have intended to reduce all the terms of the contract into writing, then no oral evidence

Illustrations—(a) A policy of insurance is effected on goods “in ships from Calcutta to London.” The goods are shipped in a particular ship which is lost. The fact that the particular ship was orally excepted from the policy, cannot be proved.

C.U. 1914(b). (b) A agrees absolutely in writing to pay B Rs. 1000 on the 1st of March, 1873. The fact that, at the same time an oral agreement was made that the money should not be paid till the 31st of March cannot be proved.

C.U. 1917(a). (c) An estate called “The Rampur Tea Estate” is sold by a deed which contains a map of the property sold. The fact that land not included in the map had always been regarded as part of the estate and was meant to pass by the deed cannot be proved.

What is the nature of the documents whose terms may not be varied or contradicted by any oral evidence? Are there any exceptions to the rule? C.U. 1915(b). Enumerate the rule laid down in the I. E. Act regarding exclusion of evidence of oral agreement which would affect or vary the terms of a document.

C.U. 1902(b).
Bom. 1920(b).

Note.—We have seen in S. 91 that as a rule, extrinsic evidence is not admissible to *supersede* the term of a document. Now we have to see how far extrinsic evidence is admissible to *control i. e.* to contradict, vary, add to or subtract from the terms of a document. When parties have deliberately put their mutual engagements into writing, it is only reasonable to presume that they have introduced into the written instrument every material term and circumstance. Consequently, other and extrinsic evidence will be rejected because such evidence while deserving far less credit than the writing itself, would inevitably tend, in many instances, to substitute a new and different contract for the one really agreed upon and would thus, without any corresponding benefit work infinite mischief and wrong. And where the law expressly requires that a matter should be reduced to the form of a document the admission of extrinsic evidence would plainly render such requirement nugatory. It is there-

is admissible, but if they intended only to reduce into writing a portion of the terms of the contract then they are entitled to give parol evidence of the terms which they not intend to reduce into writing. (17 Cal. 176; 6 Cal. 337; 14 W. R. 519).

fore provided that as a general rule when a transaction has been reduced into writing, either by requirement of law, or by agreement of the parties, the writing becomes the exclusive memorial thereof; and no extrinsic evidence is admissible either to independently prove the transaction (S. 91) or to contradict, vary, add to, or subtract from the terms of the document (S. 92) though the contents of such document may be proved either by primary or secondary evidence. This rule is founded on the obvious inconvenience and injustice that would result, if matters in writing, made by advice, and on consideration, and intended finally to embody the entire agreement between the parties, were liable to be controlled by, what Lord Coke expressively calls, 'the uncertain testimony of slippery memory.' In choosing the solemn form employed to express and embody their agreement, parties have intended thereby fully to express that agreement, removing it in this way from debatable questions and beyond the reach of future controversy, bad faith or treacherous memory. To admit parol evidence would in the intendment of law, utterly defeat this object. The instrument therefore is conclusive as to the point which it covers. *

Secs. 91 and 92 compared.—Sec. 92 is supplementary to Sec. 91 and is to some extent implied in it. If the contract, grant or disposition has been reduced into writing. Sec. 91 says no evidence shall be given of it except the document itself, and this rule would be in vain, unless, as is said in S. 92, it was also forbidden to contradict, vary, add to or subtract from its terms. (Markby), Sec. 91 deals with *exclusiveness* of the documentary evidence, that is, if

"By S. 92 of I. E. Act no evidence of any oral agreement or statement can be admitted as between the parties to any such instrument or their representatives in interest for the purpose of contradicting, varying, adding to or subtracting from, its terms subject to the exceptions contained in the several provisos." Illustrate this by reference one leading decision, C. U. 1917(a). Discuss whether oral evidence is admissible to prove some items of an agreement entered into between the parties when some others have been reduced into writing in letters exchanged between the parties, C. U. '22 (a).

* The same general rule prevails in equity as at law, that, parol evidence is not admissible to contradict, qualify, extend or vary written instruments; and that the interpretation of them must depend on their own terms. But in cases of accident, mistake, fraud, etc. Courts of equity are constantly in the habit of admitting parol evidence to qualify and correct, and even to defeat, the terms of written instruments.

When is oral evidence admissible to contradict or vary a document and when not? Give examples. C.U. 1912(a), 1916 (a); Bom 1913(b). State the exceptions, if any, to the general rule of law embodied in sec. 92 of the I. E. Act. Punj. 1916; Bom. 1917(b). In what cases is oral evidence admissible to explain the contents of documents? Bom. 1915(a). "Oral evidence is not allowed to contradict vary, add to or subtract from the terms of a written document." Discuss this rule and the limitations if any, to it. C.U. 1927(a).

the transaction has been reduced to writing then the existence of that document excludes all other evidence of the transaction. Sec. 92 deals with *inclusiveness* of the documentary evidence, that is, when the parties have deliberately put their agreement into writing, it is conclusively presumed between them and their privies, that they intended the writing to include and to form a full and final statement of their intentions and the parties or their privies are thus forbidden by the terms of S. 92 from giving any extrinsic evidence, to contradict, vary or explain written instruments unless the case falls within any of the provisos to this section. (Sarkar)

Non-applicability of the section.—Oral evidence to contradict, vary, add to or subtract from, the terms of writing, is excluded only as *between the parties to the instrument or their representatives in interest*. Persons other than the parties or their representatives, that is, third parties are not precluded from giving evidence to contradict, vary, add to or subtract from the terms of the document. *Vide* S. 99 *infra*. This is based on the principle that third persons are not to be prejudiced by things recited in a writing contrary to the truth, through the ignorance, carelessness or fraud of the parties; nor thereby precluded from proving the truth, however contradictory it may be to the written instrument. (Taylor). The words "between the parties to such instrument" refer to the persons who on the one side and the other came together to make the contract or disposition of property and would not apply to questions raised between the parties on the one side only of a deed, regarding their relations to each other under the contract. (Contra: 1 Bur. L. J. 160). The words do not preclude one of two persons in whose favor a deed of sale purported to be executed from proving by oral evidence in a suit by the one against the other, that the defendant was not a real but a nominal party only to the purchase and that the plaintiff was solely entitled

to the property to which it related notwithstanding that the defendant was described in the sale-deed as one of the two purchasers. (10 All. 321).

'When the terms of any contract, grant or other disposition of property.'—These words when read with the words "as between the parties to any such instrument" which follow them, refer to those instruments only by which rights are disposed of between two parties, that is, they refer to *bilateral* instruments only and not to unilateral instrument, such as wills, and powers of attorney.

'Or any matter required by law to be reduced to the form of a document.'—These words when read with the words "as between the parties to any such instrument" appear to refer to *bilateral* contracts, grants or other dispositions of property, which the law requires to be reduced to writing, and not every and all matters which the law requires to be reduced to writing.

'Have been proved according to the last section.'—These words indicate that this section comes into force only when the written instruments referred to in this section have been proved in accordance with the provisions of the preceding section (*i. e.* S. 91), that is, either by the production of the document itself or by the production of the secondary evidence of it, where secondary evidence is admissible under S. 65 of this Act.

'No evidence of any oral agreement or statement shall be admitted etc.'—Verbal evidence is not admissible to vary or alter the term of written contract in which there is no fraud or mistake and in which the parties intend to express in writing what their words import. If a man writes that he sells absolutely, intending the writing, which he executes, to express and convey the meaning that he intends to sell absolutely, he cannot by mere verbal evidence show that, at the time of the agreement, both parties intended that their contract should not be such as their written words express but that which they expressed

by their words to be an absolute sale, should be mortgage. A rule of evidence allowing a written contract to be varied by verbal evidence would lead to the grossest fraud, and would open the widest door to perjury in support of fraud (But parol evidence of the *act* and *conduct* of the parties is admissible to show whether they intended to act upon the deed as an absolute sale or treat the transaction as a mortgage (*Per* Peacock, C. J., in *Kashinath v. Chundicharan* 5 W. R. 68 F. B. J]) Similarly, extrinsic evidence is *not* admissible for the purpose of showing that a document which purports to be, and is, on the face of it, a deed of sale, is, in reality, a deed of gift (27 All. 612 ; 28 Cal. 70). [But for contrary view see 33 All. 340, P. C. (=15 C. W. N. 521=13 C. L. J. 510) where it has been *held* that parol evidence is admissible to prove that a document purporting to be a deed of sale was in reality intended to operate as a gift. (27 All. 612, reversed).]

Discuss the law laid down in the case of *Balkissen v. Legge* as to the admissibility of oral evidence for the purpose of ascertaining the intention of parties to a deed. How far is evidence of subsequent conduct and oral evidence proving a contemporaneous agreement admissible to prove that a document in form

Evidence of intention, act and conduct.—There has been a considerable divergence of opinion on the question whether evidence of intention, act and conduct is excluded by the terms of this section. The Privy Council has laid down in *Balkissen v. Legge* (22 All. 149) that oral evidence of *intention* is not admissible for the purpose of construing a deed or ascertaining the intention of the parties in interpreting language used in a written document. Where the question is whether a particular deed is a mortgage by conditional sale or an out-and-out-sale, oral evidence is inadmissible under S. 92 for the purpose of construing the deed nor can evidence of oral agreement at variance with the terms of the deed be admitted but the case must be decided on a consideration of the contents of the document with such extrinsic evidence of other circumstances as may show in what manner the language of the document is related to existing facts. A Full Bench of the Calcutta High Court (25 Cal. 603) held that oral evidence of the *act*

and *conduct* of parties, such as oral evidence that possession remained with the vendor notwithstanding the execution of a deed of out-and-out-sale, was admissible to show that a certain conveyance was really a mortgage. This view was subsequently adopted in 28 Cal. 289 and in 28 Cal. 256 where it has been held that the case of *Balkissen v. Legge* does not affect the Full Bench case in 25 Cal. 603 as there is a clear distinction between oral evidence of *intention* and oral evidence as to *acts* and *conduct* of parties. The Privy Council ruling in 33 All. 340 supports the view taken by the Calcutta High Court in 25 Cal. 603 F. B. and in 28 Cal. 256 and 289 and makes oral evidence as to acts and conduct of parties admissible to determine the nature of the document. But the Madras High Court (25 Mad. 7 ; 38 Mad. 226) and the Bombay High Court (30 Bom. 118, 426 ; 34 Bom. 39 ; 35 ; Bom 93, 231 ; 36 Bom. 387) have held that the Calcutta Full Bench case in 25 Cal. 603 has been overruled by the Privy Council case of *Balkissen v. Legge*. The Privy Council decision in 45 Cal. 320* supports the view taken by the Bombay and Madras High Courts and holds that evidence as to subsequent acts and conducts of parties are not admissible to show that a document is really not what it purports to be. The Calcutta High Court also has recently held that where the terms of a contract are unambiguous, no evidence can be given of the conduct of the parties in contravention of such terms. (32 C. L. J. 15, 19 and 402 ; 24 C. W. N. 874).

[**Problems :** (1) At the time of the execution of a conveyance for a garden the purchaser executed an agreement in his vendor's favour to re-sell the garden to him at a stated price within a stated time. The purchaser was put in possession. Without exercising his right of purchase according to the agreement and after expiry of the time provided for the purpose, the vendor instituted a suit against

of a sale deed is in reality a deed of mortgage. Bom, 1912(a). Is oral evidence admissible to show that a deed of sale is in reality a deed of gift ? Give reasons for your answer. C.U. 1917(b). What was laid down by the Privy Council in the case of *Balkissen v. Legge* ? Does that decision exclude evidence as to acts and conduct of parties ? C.U. 1912(a), 1916 (a). Discuss the case of *Balkissen v. Legge* (22 All 149) with special reference to the rules of evidence applicable to the facts of the case. C.U. 1919(b). Is evidence of conduct admissible to show that a transaction is not what it

* The dictum of the Privy Council in 45 Cal. 320 was only an expression of opinion (*obiter dictum*) as the actual decision in the case rested on different grounds (68 I. C. 583.)

purports to be ?
 C.U. 1915(b).
 State briefly what was decided in the following case :—
Bal Kishen Das, v. Legge.
 Mad. 1915.
 How far oral evidence is admissible to contradict or vary the terms of an instrument ? State the facts of the case of **Balkissen v. Legge**, 22 All. 149 and the rules laid down in that case.
 C.U. 1923(a).

the purchaser for redemption of the garden upon the alleged basis of a mortgage with possession by way of conditional sale. At the trial the vendor seeks to adduce oral evidence in support of his allegations in variation of the terms set forth in the documents. How far is he entitled to do so ? C. U. 1912 (a). The evidence is inadmissible. Oral evidence for the purpose of ascertaining the intention of the parties to the deed is not admissible under the section. (22 All. 149 25 Mad. 7 ; 45 Cal. 320 P. C.). See above.

(2) Parties enter into a sale deed with a contemporaneous oral agreement to treat it as a mortgage. Is it open to any of the parties to plead the oral agreement ? Bom. 1915 (a). No. See above.

(3) A sells a piece of land to B by a deed for Rs. 1000. A contemporaneous deed is executed by which the parties agree that on a future date fixed the vendor will purchase back the land on payment of money to the vendee. The vendee takes possession and receives profits. The vendor does not exercise his right of re-purchase. Some year after, the vendor brings a suit to enforce his right of redemption as upon a mortgage by conditional sale. In support of his right he wants to produce oral evidence. Can he do it ? Give reasons for your answer and support it by authorities. C. U. 1926 (a). No. See above.

(4) A tenancy was created by a written lease. The rent was payable partly in kind and partly in cash, and the parties expressly provided that if the rent payable in kind was not duly delivered, the tenant would be liable for a specified fixed sum. Is oral evidence admissible to prove an agreement to realise the market value of the produce ? C. U. 20 (d). No. Oral evidence is not admissible to prove an agreement of the description which substantially varies the rights and liabilities of the parties as explicitly set out in the instrument. (12 C. L. J. 649, 646)]. Cf. 21 C. W. N. 740.

Exceptions.—In the following exceptional cases, however, extrinsic evidence, is admissible to

contradict, vary, add to, or subtract from, the terms of a document :—

(1) Any fact may be proved (a) which would invalidate any document, or (b) which would entitle any person to any decree or order relating thereto, such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, want or failure of consideration or mistake in fact or law. [Proviso (1)]

Illustrations.—(A) A enters into a written contract with B to work certain mines, the property of B, upon certain terms. A was induced to do so by a misrepresentation of B's as to their value. This fact may be proved.

(e) A institutes a suit against B for the specific performance of a contract, and also prays that the contract may be re-formed, as to one of its provisions, as that provision was inserted in it by mistake. A may prove that such a mistake was made as would by law entitle him to have the contract re-formed.

(2) A applies to B for a debt due to A by sending a receipt for the money. B keeps the receipt and does not send the money. In a suit for the amount A may prove this.

Note.—This proviso applies to cases where evidence is admitted to show that a contract is void or voidable, or subject to re-formation, upon the ground of fraud, duress, illegality etc. in its inception. From the use of the words 'such as' in the proviso, it is clear that the instances given are not exhaustive. They are set out by way of illustrations only. (32 Cal. 437).

The rule of evidence embodied in S. 92 that parol testimony cannot be received to contradict, vary, add to, or subtract from, the terms of a written document clearly implies that the document in which the terms of any contract, grant or other disposition of property are engrossed are valid documents. The rule is, therefore,

"Oral evidence is not allowed to contradict, vary, add to or subtract from the terms of a written document." Discuss the limitations, if any, to such a rule. C.U. 1925(a). A engages B as manager of a Cotton Mill.

A regularly stamped agreement is drawn up by an attorney. Can A prove by oral evidence that B fraudulently induced him to believe that he (B) had previous experience of the working of a Cotton Mill ? All. 1916.

not infringed by admission of parol evidence showing that the instrument is altogether void, or never had any legal existence or binding force. The first part of the proviso, therefore, lays down that "any fact may be proved which would invalidate any document". Thus a party to a written contract pleading that it is by way of wager only and not a genuine transaction, is entitled under S. 92, Proviso I, of the Evidence Act to adduce oral evidence of substantiate his plea. (32 Cal. 487 F. B.)

The distinction between the first part and the second part of the proviso is that the former refers to facts which would wholly invalidate a written document on the ground of fraud etc. whereas latter part refers to facts which though may not wholly invalidate the document but some rectification in its terms is necessary to express the real intention of the parties. *Vide* S. 31 of the Specific Relief Act and ill. (c) to this section. (Sarkar).

The words "or which would entitle.....thereto" mean, that in cases in which a party is entitled to a decree or order for rectification of any written instrument, he is entitled to adduce oral evidence of those facts which would entitle him to a decree or order for rectification. This will be more clearly understood when read with Ss. 31-34 of the Specific Relief Act.

Notwithstanding an admission in a sale-deed that the consideration has been received, it is open to the vendor to prove that no consideration has actually been paid. The Evidence Act does not say that no statement of fact in a written instrument may be contradicted but the terms of the contract may not be varied etc. Sec. 92 does not prevent a party to a contract from showing that there was no consideration or that the consideration was different from that mentioned in the contract. (4 C. W. N. 485 ; 25 C. W. N. 942). But though want or failure or difference in kind of the consideration may be proved, still oral evidence may not be given to

Is evidence to vary the amount of consideration

vary the amount of consideration mentioned in a registered deed. (27 C. W. N. 496). When one of the parties to a deed is under any of the provisions of this section permitted to go into oral evidence, it is open to the other party also to rebut that evidence by oral evidence. (5 C. W. N. 158).

Mistake may exist either (1) in the intention of the parties or (2) in rendering their intention into words. As regards the first, an agreement is void when *both* parties are under a mistake as to a matter of fact or a law not in force in British India. In such cases there is no contract at all. But a contract is not voidable merely because of the mistake of *one* party as to matter of fact or as to a law in force in British India. Oral evidence is admissible of such mistake, which, if established, shows that there was no agreement at all. As regards the second, an agreement is not void, if the mistake be one in rendering the intention of the parties into words for which a remedy may be obtained by the reformation of a document. In such a case there is an agreement, but the words in which it is expressed do not rightly represent the meaning of the parties. When through fraud or mutual mistake a contract or other instrument does not truly express the intention of the parties, either may institute a suit to have the instrument rectified and oral evidence is admissible to correct the mistake. (See 28 Bom. 120 ; 38 Mad. 226 ; Taylor on Evidence, Ss. 1139-40, Woodroffe & Ameer Ali p. 595, Contract Act, Ss. 20-22 and Specific Relief Act. S. 31).

[Problem : A institutes a civil suit against B, for the recovery of a property X, which, A alleges B sold to him along with other properties by a conveyance which has accidentally omitted to mention the property X, but in which conveyance a blank space has been left which, it is alleged by A, B intended to fill up by inserting the description of the property X. A says that he holds letters from B showing that he intended to convey to him (A) the property X, along

recited in a deed admissible ?
C.U. 1924(b).

with the other properties mentioned in the deed. Can A prove those letters in his suit against B, in support of his contention? Give reasons for your answer. C. U. 1918 (a). See Proviso (1) and ill. (e) to S. 92.]

(2) The existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, may be proved [Proviso (2).]

Illustrations.—(f) A orders goods of B by a letter in which nothing is said as to the time of payment, and accepts the goods on delivery. B sues A for the price. A may show that the goods were supplied on credit for a term still unexpired.

(g) A sells B a horse and verbally warrants him sound. A gives B a paper in these words: "Bought of A a horse for Rs. 500." B may prove the verbal warranty.

All. 1916 ;
Bom. 1917(a).

(h) A hires lodgings of B, and gives B a card on which is written "Rooms Rs. 200, a month." A may prove a verbal agreement that these terms were to include partial board.

A hires a lodging of B. A stamped agreement is drawn up. B sues A on the agreement. Can A prove an oral agreement showing that the letting was only to come into operation if A was transferred to Allahabad? All. 1916.

Note.—Under this Proviso proof of any collateral paid agreement which does not interfere with the terms of the contract may be given. Parties can prove that either contemporaneously or as a preliminary measure, they entered into a distinct oral agreement on some collateral matter. The only case in which oral evidence will be admitted under this proviso is (i) *where the instrument is silent on the matter sought to be proved* and (ii) *the agreement to be proved is consistent with the term of the agreement*. The oral evidence contemplated by this proviso will not be admitted, if it is, in any way, inconsistent with the terms of the written instrument (16 C. W. N. 66). When a promissory note was silent as to interest, a subsequent verbal agreement to pay interest was allowed to be proved. (12 C. L. R. 163).

In considering, whether or not this Proviso applies, the Court shall have regard to the formality of the document.

The principal rule applies only to formally complete contracts ; for in such, it is reasonable to suppose that the parties have set down all they intended, and omitted nothing. This presumption becomes weaker, as the document is found to be less formal. A hires lodgings of B for a year and a regularly stamped agreement, drawn up by an attorney is made between them. It is silent on the subject of board. A may not prove that board was included in the term verbally. If a document is very formal in its terms and carefully drawn up, it would be reasonable to presume that the whole intention of the parties was expressed, and that anything omitted was deliberately intended to be excluded in which case no oral admission would be permitted (Markby). And in the case of memorandum of agreements etc., as we are not bound to presume that every thing has been reduced to writing, parol testimony to prove additional terms, etc., is reasonably enough admissible. The rule being confined to formal and complete documents a mere receipt in general may be invalidated by parol evidence of fraud or mistake. So, of a loose memorandum which does not profess to embody the whole of the parties' intentions. On this ground the section directs the Court in considering whether parol testimony is to be admitted or not to have regard to the formality of the documents. See illustrations (c) and (d).

(3) The existence of any separate oral agreement, constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property, may be proved. [Proviso (3).]

Illustration :—A and B make a contract in writing and orally agree that it shall take effect upon the happening of a certain contingency. The writing is left with B, who sues A upon it. A may show the circumstances under which it was delivered.

Note.—The meaning of this Proviso is that a contemporaneous oral agreement to the effect that a written contract was to be of no force or effect, and that it was to impose no obligation at all until the happening of a certain event may be proved. (25 Cal. 101). The admission of such evidence shows that the contract was never to come into operation as a contract at all unless the condition precedent was complied with; it neither varies nor contradicts the writing but suspends the commencement of the obligation. (2 C. W. N. 188; Woodroffe, 598). Where the plaintiff purported to sell certain land to the defendants under a deed of sale, and there was an arrangement that the deed should take effect only if the defendants succeeded in getting possession of the property in a suit *held* that oral evidence of the arrangement was admissible in evidence under Proviso (3) to S. 92; such possession being a condition precedent to the attaching of any obligation under the contract. (9 M. L. J. 450; 29 C. L. J. 478; 44 All. 421; 11 I. C. 384). It may be proved by oral evidence that an instrument, apparently executed as a deed, had really been delivered simply as an escrow, or that a document signed as an agreement had not been intended by the parties to operate as a present contract, but that it was meant to be conditional on the happening of an event, which had never occurred. (Taylor).

The words "any obligation" in this Proviso mean "any obligation whatever under the contract, and not some particular obligation which the contract may contain." The expression "condition precedent to the attaching of any obligation etc., means a condition precedent to the contract being of any force or validity." When at the time of a written contract being entered into, it is orally agreed between the parties that the written agreement shall not be of any force or validity, until some condition precedent has been performed, oral evidence of such oral evidence is admissible to show that the condition has not been performed and consequently

that the written contract has not become binding. Until the condition is performed there is in fact no contract at all ; but where the contract has in fact become binding and has in part been performed, it is not permissible to show that some particular provision in the written contract is subject to an oral condition precedent. The distinction in point of law is that evidence to vary the terms of an agreement in writing is not admissible, but evidence to show that there is not an agreement at all is admissible. (6 Cal. 435). So the terms of a promissory note purporting to be an absolute engagement to pay on demand can not be varied by a contemporaneous oral agreement constituting an undertaking on the part of the plaintiff not to enforce the note by a suit, till the happening of a certain event or implying that the legal obligation of payment was to be postponed to or made conditional upon the happening of a certain event. (2 C. W. N. 188). An oral agreement purporting to provide that the promise to pay on demand in a promissory note, though absolute in terms, was not to be enforceable by suit until the happening of a particular event *i.e.* the legal obligation to perform the promise was to be postponed, is not such an agreement as falls within the Proviso (25 Cal. 401). In a case where the defence was that one of the executants of the handnote signed it only as surety and that his liability was only to the extent of standing as a surety for one month, it was held that this Proviso was inapplicable, as the liability attached from the date of the handnote and ceased upon the expiry of one month and the defence was not that no liability attached to the handnote until some event happened or something was done. (8 C. W. N. 101). •

(4) The existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant or disposition of property, may be proved, *except* in cases in which such contract, grant or disposition of property is by law required

to be in writing, or has been registered according to the law in force for the time being as to the registration of documents. [Proviso (4).]

Note.—This Proviso incorporates the rule laid down by Lord Denham in *Goss v. Nugent* (5 B & Ad. 58, 65) who said . “After an agreement has been reduced into writing, it is competent to the parties, at anytime before breach of it, by a new contract not in writing either altogether to waive, dissolve or annul the former agreement, or in any manner to add to, or subtract from or vary or qualify the terms of it and thus to make a new contract which is to be proved partly by the written agreement and partly by the subsequent verbal terms engrafted upon what will be thus left of the written agreement” ; but modifies that rule, in that it declares that the new contract cannot be a verbal one in cases in which the old contract is (a) by law required to be in writing or (b) has been registered. (Woodroffe, 599). This Proviso deals with three points, *viz.*, (1) where a transaction has been reduced into writing not because the law requires it to be so but for the convenience of the parties, parol evidence of any subsequent oral agreement modifying or rescinding it altogether is admissible ; (2) where a matter has been reduced into writing according to the requirement of law such writing cannot be modified or rescinded by any subsequent oral agreement, except by another written document, and (3) similarly when the contract or grant is in writing registered, whether or not writing or registration is compulsory, the rescission or modification of it by a subsequent unwritten agreement cannot be proved. (Sarkar)

(5) Any usage or custom by which incidents not expressly mentioned in any contract are usually annexed to contracts of that description may be proved : *Provided* that the annexing of such incident would not be repugnant to, or in-

consistent with, the express terms of the contract. [Proviso (5)].

Note.—Parol evidence of usage or custom is admissible to annex incidents to contracts, that is, to show what things are customarily treated as incidental and accessorial to the principal thing, which is the subject of the contract, or to which the instrument relates. For instances, when a bill of exchange or promissory note is payable either at a fixed time or on demand in Great Britain, three days, called “days of grace” are added to the time of payment as fixed by the bill. But the rule for admitting evidence of usage must be taken always with this qualification, that the evidence proposed is not *repugnant to or inconsistent with the written contract*.

(6) Any fact may be proved, which shows in what manner the language of a document is related to existing facts [Proviso (6)].

Note.—Every document must to some extent be interpreted by circumstances. However accurate and detailed a description of things and persons may be, oral evidence is always wanted to show that persons and things answering the description exist; and therefore in every case whatever every fact must be allowed to be proved to which the document does or probably may refer. (Secs. 93-97 partly develop and partly restrict the principle laid down by this Proviso). Extrinsic evidence of every material fact which will enable the court to ascertain the nature and qualities of an instrument or in other words, to identify the persons to whom and the things to which the instrument refers must of necessity be received. (Taylor).

II. Admissibility of extraneous evidence to interpret documents. (Secs. 93-100).

Though extraneous evidence is generally inadmissible to supersede (S. 91) or to control *i. e. to contradict, vary, add to or subtract from*, the terms of a document (S. 92) it may yet

Admissibility of oral evidence to explain a writing.

be admissible in *aid of* and to *explain* the document. Secs. 93-100 embody the rules as to the admissibility of extraneous evidence to interpret documents. These rules are :—

'Exclusion of evidence to explain or amend ambiguous documents. C. U. 1906.

1. When the language used in a document is, on its face, ambiguous or defective, evidence may not be given of facts which would show its meaning or supply its defects. (S. 93)

Illustrations :—(a) A agrees in writing to sell a horse to B for Rs. 1000 or Rs. 1,500. Evidence cannot be given to show which price was to be given.

(b) A deed contains blanks. Evidence cannot be given of facts which would show how they were meant to be filled.

'Specify the cases in which secondary evidence is admissible to modify or control the effect of documents admitted in evidence, Mad. 1916. State the rules as to the exclusion and admission of evidence to explain and amend documents. Bom. 1893, All. 1920 (*Vide* Ss. 93-94).

Notes.—Under this section, if the language of a deed is, on its face, ambiguous or defective, no evidence can be given to make it certain. This section embodies the rule with regard to "*patent*" ambiguities just as Ss. 95-97 *infra* relate to "*latent* ambiguities." *Patent* ambiguities cannot be cleared up by extrinsic evidence.

Ambiguities in documents are said to be either *patent* or *latent*, the former arising when the instrument, on its face, is unintelligible as where in a will, the name of the legatee is left wholly blank; the latter arising where the words of the instrument are clear, but their application to the circumstances is doubtful as when a legacy is given to "my niece Jane," the testator having two nieces of that name.*

The present section is not intended to have the effect of

Explain the distinction between "*patent* ambiguity" and "*latent* ambiguity" in a document and discuss the admissibility of extrinsic evidence to remove such

* There are two sorts of ambiguities, *patent* and *latent*. *Patent* is that which appears to be ambiguous upon the deed or instrument: *latent* is that which seems certain and without ambiguity for anything which appears upon the deed or instrument; but there is some collateral matter out of the deed that breeds the ambiguity (Bacon). "A good test of the difference is to put the instrument into the hands of an ordinary intelligent educated person. If on perusal, he sees no ambiguity but there is nevertheless an uncertainty as to its application, the ambiguity is latent; if he detects the ambiguity from merely reading the instrument, it is patent. Thus in ill. (b) to S. 93, the blanks would be patent ambiguities and they could not be filled in by parol testimony as to intention of the parties etc. In the illustration to S. 95 no one could detect

excluding evidence to explain abbreviations, illegible words, obsolete or provincial expressions, &c., which may in one sense be said to be "ambiguous or defective" as to which *vide* S. 98 *infra*. It applies to cases (1) in which either no meaning at all has been expressed, the sentence having been left unfinished, as where there is a grant "of—to A" or a grant of "Blackacre to—"; or (2) where, though the language is intelligible, it is such as to give rise to an obvious uncertainty of meaning as when a man contracts to sell "one of any horses" or a horse for "Rs. 1000 or 15000." Here as the language expresses no definite meaning, if evidence were allowed to be given as to what the intention of the person using it was, the effect would be, not to interpret words, but to conjecture as to intentions and this the section forbids. (Cunningham).

2. When language used in a document is plain in itself, and when it applies accurately to existing facts, evidence may not be given to show that it was not meant to apply to such facts. (S. 94).

Illustration :—A sells to B by deed "my estate at Rampur containing 100 bighas." A has an estate at Rampur containing 100 bighas. Evidence may not be given of the fact that the estate meant to be sold was one situated at a different place and of a different size.

Note.—The intention of the parties to a document whose language is plain and unambiguous should be gathered from the language of the document itself, without resorting to surrounding circumstances for aid (3 Bom. L. R. 768). Where the language in its ordinary sense properly applies to the facts without any difficulty, evidence to show that it bears a different meaning will be rejected, as it contradicts the document. (R. & D).

ambiguity.
C.U. 1917(b),
'24(b), '27(b).

When is evidence admissible to explain an ambiguity and when not? Give an example of each kind.
C.U. 1916(b).

Exclusion of evidence against application of document to existing facts. A donor gives a property to "A and—" by a deed of gift. Can evidence be given as to whom the donor meant by—? Give your reasons.
C.U. 1916(a).

any ambiguity from merely reading the instrument. The ambiguity does not consist in the language but is introduced by extrinsic circumstances, and the maxim is *quod ex facto ortur ambiguum verificatione facti tollitur*." (Norton).

Evidence as to document unmeaning in reference to existing facts. When is extrinsic evidence admissible under the I. E. Act? Mad. 1919(a).

3. When language used in a document is plain in itself, but is unmeaning in reference to existing facts, evidence may be given to show that it was used in a peculiar sense. (S. 95).

Illustration—A sells to B, by deed "my house in Calcutta." A had no house in Calcutta but it appears that he had a house at Howrah of which B had been in possession since the execution of the deed. These facts may be proved to show that the deed related to the house at Howrah.

Note.—This section and S. 97 contain important exceptions to the general rule laid down in S. 91. This section as well as Ss. 96 and 97 deal with *latent* ambiguities, that is, where language of the document, on the face of it, is not ambiguous, but difficulty arises in its application to the existing facts.

Evidence to application of language which can apply to one of several persons. What are the provisos to the general rule enacted by the I. E. Act excluding evidence of oral agreements or statements in the case of written contracts etc. C. U. 1902.

4. When facts are such that the language used might have been meant to apply to any one, and could not have been meant to apply to more than one, of several persons or things, evidence may be given of facts which show which of those persons or things it was intended to apply to (S. 96).

Illustrations—(a) A agrees to sell to B, for Rs. 1000 "My white horse." A has two white horses. Evidence may be given of facts which show which of them was meant.

(b) A agrees to accompany B to Haidarabad, Evidence may be given of facts showing whether Haidarabad in the Dekhan or Haidarabad in Sindh was meant.

Notes—This section also deals with *latent* ambiguity. It modifies the rule laid down in S. 94 by providing that where the language of a document correctly describes two sets of circumstances but could not have been intended to apply to both, evidence may be given to show to which set it was intended to apply.

Evidence as to application

5. When the language used applies partly to one set of existing facts, and partly, to another set

of existing facts, but the whole of it does not apply correctly to either, evidence may be given to show to which of the two it was meant to apply. (S. 97).

Illustration.—A agrees to sell B “my land at X in the occupation of Y.” A has land at X, but not in the occupation of Y and he has land in the occupation of Y but it is not X. Evidence may be given of facts showing which he meant to sell.

Note.—This section is only an extension of the rule laid down in S. 95. It is based on the maxim “*falsa demonstratio non nocet*” (a false description does not vitiate the document).

Explain and illustrate the maxim “*Falsa etc.*” Bom. 1893.

6. Evidence may be given to show the meaning of illegible or not commonly intelligible characters of foreign, obsolete, technical, local and provincial expressions, of abbreviations and of words used in a particular sense. (S. 98).

Evidence as to meaning of illegible characters etc.

Illustration.—A, a sculptor, agrees to sell to B “all my model.” A has both models and modelling tools. Evidence may be given to show which he meant to sell.

7. Persons who are not parties to a document or their representatives in interest, may give evidence of any facts tending to show a contemporaneous agreement varying the terms of the document. (S. 99).

Who may give evidence of agreement varying terms of documents.

Illustration.—A and B make a contract in writing that B shall sell A certain cotton, to be paid for on delivery. At the same time they make an oral agreement that three months’ credit shall be given to A. This could not be shown as between A and B, but it might be shown by C, if it affected his interest.

C. U. 20 (2).

Note.—This section provides an exception to the general rule laid down in S. 92. It enables strangers to an instrument to prove real nature of the transaction by parol evidence. When therefore A purported to make a gift of land to his

daughter B, it was open to a creditor of A, the husband of B, to prove by oral evidence that the transaction was in reality a sale to X and that the property was consequently liable to be attached and sold in execution of a decree obtained against him (2 C. L. J. 338). Where there was a dispute between a father and his daughter about certain properties comprised in a sale-deed, executed in favour of the daughter, whose contention was that the transaction, purporting to be a sale-deed, was really a gift in her favour, and the father contending that the document was really a sale in his favour in *benama* of his daughter,—*held* that oral evidence in support of the gift set up by the daughter was admissible; for, the question did not arise between the parties to the instrument, as though both the father and the daughter claimed through one and the same person, yet as far as the present matter was concerned, they could not be treated as parties contracting with each other, and the question was not one arising as between the parties to an instrument or their privies (27 Mad. 329). See Notes heading "Non-applicability of the section" under S. 92 *supra*.

The word "varying" is not restricted to "varying" in contradistinction to "contradicting, adding or subtracting" from the terms of a document. It embraces contradictions, additions and subtractions. (Cunningham).

The rule excluding parol evidence to vary or contradict written instruments is applicable only in suits between the parties to the instruments. These latter are to blame if the writing contains what was not intended or omits what it should have contained. But third persons are not to be prejudiced by things recited in writing contrary to the truth through the ignorance, carelessness or fraud of the parties or thereby precluded from proving the truth, however contradictory it may be to the written statement. (Taylor).

N. B. Nothing in this chapter contained shall be taken to affect any of the provisions of the

Indian Succession Act (X of 1865) as to the construction of wills. (S 100).

Note.—With regard to wills and their interpretation, special provision is made in Chapter VI of the Succession Act, 1925 the provisions of which are not affected by anything in this chapter.

[**Problems .** (1) The owner of certain property agreed to sell it to A and the contract provided that the conveyance should contain a covenant by A restrictive of the user of the property for the benefit of adjoining property owned by the vendor. The conveyance was drawn up and it recited the fact of the prior agreement, but the conveyance did not contain the covenant agreed upon. Will the rights of the parties be governed by the conveyance or by the conveyance read with reference to the antecedent agreement? **All. 1917.** (See Foot-note under S. 92 *supra*).

(2) A supplied goods to B and the latter executed a promissory note in part payment of the goods supplied. A sued upon the promissory-note. B pleaded that there was an oral agreement contemporaneous with the promissory-note made by A that B was not to be called upon to pay if the goods supplied should be unequal to sample. The goods were retained by B but he proved that they were unequal to sample. Would evidence in support of the oral agreement be admissible and if not, why not? **All. 1917.** [See S. 92, ill. (b) and notes under Proviso (3) to S. 92].

(3) A executes a sale-deed of land in favour of his daughter B. On B's death soon after, A sues B's husband C, for a declaration that the sale was not a real transaction, and that it was only intended to vest the property in B if she survived A. C contends that the transaction was a valid sale to himself, B's name only appearing in the deed *bonam fide* for him. Examine whether the contentions of A and C or of either can be proved under English and Indian Law.

Mad. 1916. *Vide* Notes under S. 92 and S. 99, notes at p. 253 *et seq.*).

(4) A and B jointly execute a promissory note to C. In a suit by C against A and B, B sets up an oral agreement by C at the time of the transaction that he was to be liable only as a surety for A. Is the agreement provable under English and Indian Law? **Mad., 1916.** No. Evidence is not admissible to show that of two executants of a promissory note, one was only a surety. (24 M. L. J. 91 ; 8 C. W. N. 101). An executant of a promissory note is precluded by Sec. 92 of the Evidence Act from setting up a contemporaneous oral agreement that he should not be made liable on the promissory note (20 M. L. J. 144) *Cf* 3 Cal 174 ; 25 All. 337.

(5) A sues B upon a pro-note payable on demand. A's brother is indebted to B who offers to give evidence that it was agreed at the time the note was executed that A should not enforce the same until after his brother had paid B the debt. Is the evidence admissible? C. U. 1901. (No See S. 92, ill. (h) and notes under Proviso (3) to S. 92.

(6) A leaves a will whereby he bequeaths to the children of X certain Government securities in equal shares. Oral evidence is offered to show who and how many children of X are. Is the evidence admissible? C. U. 1901 (Yes. See Proviso (6) to S. 92 *supra*.

PART III. Production and Effect of Evidence.

Subject-matter of Part III.—The third part of the Evidence Act relates to the production and effect of evidence. Three main topics with which the Law of Evidence is concerned, as has been said before, are :—1 *Relevancy of facts* or what sort of facts may be proved in order to esta-

lish the existence of the right, duty or liability defined by substantive law. II. *Proof of relevant facts* or what sort of evidence must be given of a fact which may be proved. III. *Production of proof* of relevant facts, *i.e.*, by whom and in what manner the evidence must be produced by which any fact is to be proved. In the foregoing pages the answers to the first two questions have been given. We shall now take up the third question which forms the subject-matter of this part of the Act.

General scheme of Part III.—Part III consists of five Chapters (VII-XI) containing 67 sections (101-167). Chapter VII which relates to the burden of proof deals with the question as to which of the parties to the cause is bound to adduce the evidence which is to form the materials of belief on the question at issue, or in other words on which of the parties the burden of proof lies. Chapter VIII deals with the effect of evidence arising from estoppels as precluding the admission of evidence upon the particular matter in respect of which the estoppels operate. Chapter IX which relates to witnesses deals with the subjects of competency and compellability of witnesses to give evidence. Chapter X lays down certain rules governing the examination of witnesses. Lastly, Chapter XI deals with the effect of improper admission or exclusion of evidence.

CHAPTER VII.—The Burden of Proof.

(Ss. 101-114).

Chapter VII deals with the subject of the burden of proof. The subject of every judicial enquiry is to produce in the mind of the Judge, jury or other deciding authority, a belief as to the existence or non-existence of certain facts, on which the rights or liabilities of the parties and the decision of the case depend. This belief is produced by presenting to the Judge's mind various facts, which constitute the materials out of which his belief is to be formed. The

General
scheme of the
chapter.

first part of the Act deals with the materials out of which the Judge's opinion is to be formed and the rest of the Act with the modes in which that material is to be brought to the Judge's mind, *viz.*, by oral or documentary evidence according to the circumstances of the case. This, however, by no means exhausts all the topics which have to be considered with reference to the subject of proof. There is, in the first place, the all-important question as to which of the parties before the court is bound to supply the evidence which is to be the material of the judge's belief on the question in dispute, in other words, on which of the parties the burden of proof lies. There are, as we have seen in section 56-58, certain facts which need not be proved by either party; but all other facts can be found by the court only on legal proof, and the question as to whose duty it is to supply this is frequently of the most momentous consequence to the parties (C. & S.).

Explain fully the statement that the onus probandi lies on the party who substantially asserts the affirmative of the issue. Bom. 1917(a). What is meant by "burden of proof"? C.U. 1910(b), 1915 (a). 1914 (a), 19 (a); Bom. 1894, 1909 (b), 1920 (a); Punj. 1917; All. 1919. State some rules to determine which of the contending parties to a suit should

✓ **Rules as to Burden of Proof.**—(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist :

(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person. 'S. 101'.

Illustrations—(a) A desires a Court to give judgment that B shall be punished for a crime which A says B has committed. A must prove that B has committed the crime

(b) A desires a Court to give judgment that he is entitled to certain land in possession of B by reason of facts which he asserts and which B denies to be true. A must prove the existence of these facts.

Note.—The burden of proof or *onus probandi* is governed by certain rules having their foundation in principles of natural reason, to which an artificial weight is superadded by the reason and policy of law. Every controversy ulti-

imately resolves itself into this, that certain facts or propositions are asserted by one of the disputant parties, which are denied, or at least, not admitted, by the other. The party who asserts a fact or proposition must prove his assertion,—the burden of proof lies upon him; and the party who denies that fact or proposition need not give any reasons or evidence to show the contrary, until his adversary has at least said some probable grounds for belief of it. (Best). A person who brings another before a judicial tribunal must succeed by the strength of his own right and the clearness of his own proof and must not rely on the want of right or the weakness of proof of his opponent (17 C. B. 72).

Boundary disputes—In a question of boundary disputes the *onus* of proof lies upon the plaintiff to prove by independent evidence his right to recover (10 M. I. A. 81; 10 C. L. R. 169; 13 M. I. A. 57). Thus where a plaintiff seeks to establish his right to land by setting aside an award made by Government officers on a revenue survey and by showing that the boundary laid down by such officers is erroneous, the burden of proof is on him and he must prove his allegations by independent evidence. (*ibid*) Similarly when the defendant in a suit for recovery of possession of land is clearly shown or found to have been in actual possession of the disputed area, the *onus* falls on the plaintiff to establish his title. (27 C. L. I. 599). So also in a case of disputed boundary between a *lakhiraj* tenure and a Zemindar's *mal* land, it lies upon the plaintiff to prove the case set up by him. (8 W. R. 209; 10 W. R. 413). But where a disputed line of division runs between waste lands, which have not been the subject of definite possession, the ordinary rule regarding the *onus* falling upon the plaintiff does not apply and it is the duty of the defendant as well as the plaintiff to aid the court in ascertaining the true boundary. (21 Cal. 504) When land is within the ambit of the plaintiff's Zemindary, and the defen-

prove the relevant facts. C.U. 1914(a). What are the general principles regulating the burden of proof? Illustrate your answer by example. C.U. 1907; Bom. 1894, 1910 (b), 20 (a); Madl. 21 (a). What do you understand by :— Onus probandi? All. 1917. State the law regarding the burden of proof. On whom does the burden of proof lie in a boundary dispute? C.U. 1028(1)

dant sets up an adverse title by reason of an under-tenure, the burden of proof is on the defendant. (10 M. I. A. 165, 171 ; 12 C. L. R. 457 ; 9 C. W. N. 144). But where the plaintiff admits that there is a *howla* within his zemindaries and that the defendant has land in that *howla* but alleges that he has exceeded the boundaries of that *howla* and has encroached upon his lands the *onus* is on the plaintiff to show that the defendant has encroached. (12 C. L. R. 457 ; 9 C. W. N. 144). When the defendant has obliterated the boundary mark, it is sufficient for the plaintiff to show the general direction of the boundary, and the *onus* of proof that the direction is wrongly stated lies on the defendant who obliterated the boundary mark. (25 W. R. 524).

2. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side. (S. 102).

Illustrations.—(a) A sues B for land of which B is in possession, and which as A asserts, was left to A by the will of C, B's father. If no evidence were given on either side, B would be entitled to retain his possession. Therefore the burden of proof is on A.

Punj. 1917. (b) A sues B for money due on bond. The execution of the bond is admitted but B says that it was obtained by fraud, which A denies. Therefore the burden of proof is on B.

Note.—This section supplies a test which is frequently applied in the English cases, for the purpose of ascertaining on whom the burden of proof lies. There are two tests for ascertaining on which side the burden of proof lies : *first*, it lies on the party, who would be unsuccessful, if no evidence were given of either side ; and *secondly*, it lies upon the party who would fail, if the particular allegation in question were struck out of the pleading.

Whenever litigation exists somebody must go on with it ; the plaintiff is the first to begin ; if he does nothing he fails ; if he makes a *prima facie* case add nothing

What do you understand by "burden of proof" ? Upon whom does burden of proof ordinarily lie and how has it to be discharged ? Under what circumstances may such burden be shifted ? C. U. 190 (b).

is done to answer it the defendant fails. The test, therefore, as to the burden of proof simply is this, to ask oneself which party will be successful if no evidence is given or if no more evidence is given than has been given at a particular point of the case ; for it is obvious that as the controversy involved in the litigation travels on, the parties from moment to moment may reach points at which onus of proof shifts and at which the tribunal will have to say that if the case stops there, it must be decided in a particular manner. (Per Brown, L. J, in *in Abrath v. N. F. Ry. Co.*, L. R. 11 App. cases 251).

Are there any exception to general rule that a party, who desires to move the court must prove all facts necessary for the purpose ? C.U. 1917(a).

[**Problem** : A mortgage bond was executed by father of A in favour of father of B. In a suit by B against A, the plaintiff produced a certified copy of the bond from the Registration office as the original was lost. A admitted execution of the bond by his father, but contended that the bond was not duly executed and attested according to law. On whom does the burden of proof lie to prove execution and attestation ? C. U. 1924 (a). (See above.)].

3 The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence unless it is provided by any law that the proof of that fact shall lie on any particular person. (S. 103).

Criticise the rule that the onus probandi is upon the party who, affirms and not upon the party who denies. Mad. 1919 (b).

Illustration.—A prosecuted B for theft and wishes the court to believe that B admitted the theft to C. A must prove the admission. B wishes the court to believe that at the time in question, he was elsewhere. He must prove it.

Note.—The general principle of law is that the man who brings another before a judicial tribunal must rely on the strength of his own proof and not on the want of right or the weakness of proof in his adversary. When, however, the defendant or either litigant party instead of denying what is alleged against him relies on some new matter which if true is an answer to it, the burden of proof changes side ;

The general principle with regard to the burden of proof may be stated to be that a party who desires to move the

Court must prove all facts necessary for that purpose. Illustrate. Are there any exceptions to this general rule ? C. U. '17(b).

and he in turn is bound to show a *prima facie* case at least and if he leaves it imperfect the court will not assist him. This section is merely an amplification of the rule laid down in S. 101.

[**Problem** :—(a) In a suit to recover property to which A alleged that he was entitled by inheritance from his natural father the defendant's plea was that A had been adopted into another family and therefore, was no longer his natural father's heir. On whom is the onus of proving the adoption ? (Generally he who sets up a case of adoption will have to prove the same : 21 I. C. 737.) If it be on the defendant, is that discharged by his producing certain deeds signed by A in which A had admitted his adoption, to none of which, however, the defendant was a party ? Can A let in evidence to rebut the presumption if any, arising from such deed ? Give reasons. (b) In a suit against a Railway Co. for damage for the death of a person caused by the explosion of dangerous goods permitted to be carried in a railway carriage by passengers, on whom is the burden of proof to show that the Company was guilty of negligence ? Mad. 1915.

Burden of proving fact to be proved to make evidence admissible.

4. The burden of proving any fact necessary to be proved in order to enable any person to give evidence of any other fact is on the person who wishes to give such evidence. (S. 104).

Illustrations—(a) A wishes to prove a dying declaration by B. A must prove B's death.

(b) A wishes to prove by secondary evidence, the contents of a lost document. A must prove that the document has been lost

Note.—The sum and substance of this section is that no person shall be entitled to give evidence of any fact, without first showing that he is legally entitled to do so. When it is necessary to render a particular evidence admissible that some fact should be proved, the burden of proving that fact lies on the person who wants to use the evidence. This

section should be read with Cl. 2 of S. 136 and with the illustrations attached to that section.

5. When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the General Exception in the Indian Penal Code or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him, and the court shall presume the absence of such circumstances. (S. 105).

Illustrations :—(a) A, accused of murder, alleges that, by reason of unsoundness of mind, he did not know the nature of the act. The burden of proof is on A.

(b) A, accused of murder, alleges that, by grave and sudden provocation he was deprived of the power of self-control. The burden of proof is on A—

(c) S. 325 of the Indian Penal Code provides that whoever except in the case provided for by S. 335, voluntarily causes grievous hurt, shall be subject to certain punishments. A is charged with voluntarily causing grievous hurt under S. 325. The burden of proving the case under S. 335 lies on A.

Note.—This section is an exception to the general rule that in all criminal trials the burden of proving every fact essential to bring the charge home to the accused lies on the prosecution. When a person accused of an offence, sets up a general or special exception in his defence and pleads that the acts, alleged to have been committed by him, do not constitute an offence, as his case falls under some of the general or special exceptions in the Penal Law, the burden of establishing the circumstances which would bring the case within the exceptions lies on him. The court will presume the non-existence of any exception in the particular case and the accused person who relies on its existence has the burden of proof cast upon him. Before the passing of

Burden of proving that the case of the accused comes within the exception lies on him. In what cases the burden of proof may be thrown on the accused in a criminal trial? Bom. '13 (b). State the provisions relating to burden of proof in criminal cases, Mad. '19 (b). Mention the exceptions to the rule that the burden of proof lies on the party who asserts the affirmative of the question in dispute, All. 1919.

Burden of proving fact specially within knowledge.

the Evidence Act, it was the duty of the prosecutor to negative the existence of special exceptions.

6. When any fact is especially within the knowledge of any person the burden of proving that fact is upon him. (S 106).

Illustrations :—(a) When a person does an act with some intention other than that which the character and circumstances of the act suggest, the burden of proving that intention is upon him.

(b) A is charged with travelling on a railway without a ticket. The burden of proving that he had a ticket is on him.

Enumerate the instances in which the burden of proof is determined in particular cases not by the relation of the parties but by presumptions. Bom. 1900. Discuss the rule of presumption as given in the I. E. Act when the question is as to the death of a person known to have been alive within 30 years and also of a person who has not been heard of for 7 yrs. C. U. '87 (a). Burden of proving death

Note.—This section lays down the principle that where the subject-matter of an allegation lies peculiarly within the knowledge of any party to a suit that party must prove it, whether it be of an affirmative or of a negative character, and even though there be a presumption of law in his favour. "Where a hawker or pedlar stands charged with trading without a license, it is easy for him to produce his license and so end the discussion, whereas it may throw the most serious impediment in the way of prosecutor if he were bound to prove that the hawker was not licensed. So in an action for practising as an apothecary without a certificate the defendant must produce his certificate." (Norton on Evidence, 298). The general rule that a party who desires to move the court must prove all facts necessary for that purpose (Ss. 101-105) is subject to two exceptions :—(1) He will not be required to prove such facts as are especially within the knowledge of the other party (S. 106); and (2) He will not be required to prove so much of his allegations in respect of which there is any presumption of law (Ss. 107-113), or in some cases, of fact. (S. 114) in his favour.

7. (1) When the question is whether a man is alive or dead and it is shown that he was alive within 30 years the burden of proving that he is dead is on the person who affirms it. (S. 107).

(2) But when the question is whether a man is alive or dead, and it is proved that he has not been heard of for 7 years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is shifted to the persons who affirm it. (S. 108).

Note—These sections and the section following them deal with certain instances of the presumption which exists in favour of the continuance of human affairs, in the state in which they are once shown to be. Mr. Taylor observes ; "Various *prima facie* legal presumptions are founded on the continuance or immutability, for a longer or shorter period, of human affairs, which experience tells us usually occurs. So when the existence of a person or personal relation or a state of things is once proved, the law presumes that the person, relation or state of things continue to exist till the contrary is shown or till a different presumption is raised from the nature of the subject." The rules contained in Ss. 107 and 108 do away with the rules of the Hindu and the Mahomedan laws and establish a uniform rule upon the subject-matter both for the Hindus and the Mahomedans as well as others.

S. 107 provides that if a person whose existence is in question is shown to have been alive within 30 years, the burden of proving him to be dead lies on the person affirming it. Thus according to this section there is a legal presumption of continuance of life, if nothing is shown to the contrary. He who assails this presumption by asserting death must prove the truth of its allegation to rebut the legal presumption. Sec. 108 is proviso to S. 107 and it provides that if a man has not been heard of for 7 years by those persons who would naturally have heard of him had he been alive, the presumption of continuance of life under S. 107 ceases and the burden of proving him to be alive lies on the person asserting it by denying the death.

Ss. 107 and 108 deal with the question whether a person

of persons known to have been alive within 30 years. Burden of proving that a person is alive who has not been heard of for 7 years. The question is whether a person, known to have been alive within 30 years, is dead. Who must prove that he is dead? How is the burden shifted, if he has not been heard of for 7 years? Illustrate. C. U. '20 (b). Explain clearly the provisions of the I. E. Act regulating the onus of proof on the question whether a person is alive or dead? Mad. 1915. State the provisions of the I. E. Act regulating the onus of proof as to question whether a person is alive or dead. Mad. '18 (a)

19(a), 20(a),
21 (a).

"Various prima facie legal presumptions are founded on the continuance or immutability

for a longer or a shorter period of human affairs which experience tells us, usually occur".

Discuss this in the light of provisions of the I. E. Act when the question is as to the death of a person known to have been alive within 30 years and also of a person who has not been heard of for 7 years.

C. U. '24 (b). Burden of proof as to relationship in the cases of partners, landlord and tenant, principal and agent.

Burden of proof as to ownership.

is alive or dead; the law raises no presumption as to the time of a person's death. If therefore any one has to establish the precise period at which a person died, he must do so by evidence and can neither rely, on the one hand, upon the presumption of death nor on the other, upon the continuance of life. (23 Bom. 295).

[**Problem.**—P, the reversioner, to the estate of X, became a *Sanyasi*, had not been heard of for 9 years and no proof of his being alive was forthcoming. X's widow who was in possession of his estate alienated a portion, and the reversioner next after P instituted a suit to avoid the alienation by X's widow. The defence was that the plaintiff could not maintain his suit as he was not the next reversionary heir, since P's death had not been proved. Indicate the points that are open to the plaintiff to urge in support of his claim in the suit. C. U. 1912 (a). Under S. 108, P is presumed to be dead and the Plff. consequently becomes the next reversionary heir and as such competent to maintain the suit].

8. When the question is whether persons are partners, landlord and tenant, or principal and agent, and it has been shewn that they have been acting as such, the burden of proving that they do not stand, or have ceased to stand to each other in those relationships respectively, is on the person who affirms it. (S 109).

Note.—A partnership, agency, tenancy or other similar relation, once shown to exist is presumed to continue till it is proved to have been dissolved. This section is founded on the presumption that things once proved to have existed in a particular state are to be understood as continuing in that state until the contrary is established by evidence either direct or circumstantial.

9. When the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not

the owner, is on the person who affirms that he is not the owner. (S. 110).

Note.—Possession affords *prima facie* presumption of ownership, for men generally own what they possess. "The presumption of right in a party who is in the possession of property is highly favoured in every system of jurisprudence : and seems to rest partly, on principles of natural justice, and partly on public policy." (Best).

10. When there is a question as to the good faith of a transaction between parties one of whom stands to the other in a position of active confidence, the burden of proving the good faith of the transaction is on the party who is in a position of active confidence. (S. 111).

Proof of good faith in transactions where one party is in relation of active confidence.

Illustrations—(a) The good faith of a sale by a client to an attorney is in question in a suit brought by the client. The burden of proving the good faith of the transaction is on the attorney.

(b) The good faith of a sale by a son just come of age to a father is in question in a suit brought by the son. The burden of proving the good faith of the transaction is on the father.

Note.—Where a fiduciary or quasi-fiduciary relation exists, the burden of sustaining a transaction between the parties rests with the party who stands in such a relation and is benefited by it. The illustrations attached to the section only mention two of such relationship by way of examples. There are other confidential or fiduciary relationship (e. g., between guardian and ward, between spiritual adviser and disciple, between medical attendant and his patient, between trustee and *cestui que* trust, between husband and wife &c.) to which also the principle laid down in this section applies.

The general rule being that the burden of proof lies on the person who seeks to set aside a completed transaction, this section provides that the burden shall be shifted when it appears that as between the person seeking such relief on

How far is the statutory meaning of "conclusive proof" retained in S. 112 dealing with legitimacy? C. U. '18(b).

Birth during marriage conclusive proof of legitimacy.

What presumption will the court draw as to legitimacy? Bom. '19 (a); Mad. '20 (b), 1921 (b).

Proof of cession of territory. Comment on this proposition. Mad. '11 (b); Bom. '15 (a).

Court may presume certain facts.

the ground of fraud or undue influence and the person against whom the relief is sought there is a special relation of a confidential or fiduciary character. The reason why the burden of proving good faith is, by way of exception to the general rule, cast upon the defendant, is that if it were not so, the transaction could rarely be satisfactorily enquired into. The plaintiff having been entirely in the hands of the defendant would be destitute of means of proving affirmatively the *mala fides* of the transaction; whilst the defendant may in such a transaction fairly be subjected to the duty not only of dealing honestly but of preserving clear evidence that he has done so. (W. & A.)

11. The fact that any person was born during the continuance of a valid marriage between his mother and any man or within 280 days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, *unless* it can be shewn that the parties to the marriage had no access to each other at any time when he could have been begotten. (S. 112).

Note.—The preceding section deals with cases where the presumption being one way, it is for the other party to rebut the presumption by evidence in his favour. Secs. 112-113 furnish additional cases of presumptions regulating *onus* of proof. But here, no evidence to the contrary is admissible—the facts being conclusive proofs.

12. A notification in the Gazette of India that any portion of British territory has been ceded to any Native State, Prince or Ruler, shall be conclusive proof that a valid cession of such territory took place at the date mentioned in such notification. (S. 113).

Note.—It has been decided by the Privy Council in 1 Bom. 367 that this section is a dead letter.

13. The Court *may* presume the existence of any fact which it thinks likely to have happened,

regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case. (S. 114).

*Illustrations.**—The Court may presume—

(a) That a man who is in possession of stolen goods, soon after the theft, is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession. Punj. 1916.

(b) That an accomplice is unworthy of credit, unless he is corroborated in material particulars.

(c) That a bill of exchange accepted or endorsed, was accepted or endorsed for good consideration.

(d) That a thing or state of things which has been shown to be in existence within a period shorter than that within which such thing or state of things usually cease to exist, is still in existence.

(e) That judicial and official acts have been regularly performed.

(f) That the common course of business has been followed in particular cases.

(g) That evidence, which could be, and is not, produced, would, if produced, be unfavourable to the person who withholds it. Mad. 1917.

(h) That if a man refuse to answer a question which he is not compelled to answer by law, the answer if given, would be unfavourable to him. Punj. 1916.

* The presumptions mentioned in S. 114 fall under three classes :— (1) Presumptions arising from the common course of natural events. (2) Presumptions arising from the common course of human conduct. (3) Presumptions arising from the common course of public and private business. Ill. (d) refers to the first class, ill. (a), (b), (g), (h) and (i) to the second class and ill. (c), (e) and (f) to the third class. In the illustrations a number of the most familiar presumptions of the English law are given, and it is shown in the first part of the illustrations how the Court might be justified in following them, and in the second, how other circumstances might justify the Court in setting them aside.

(i) That when a document creating an obligation is in the hands of the obligor the obligation has been discharged.

But the Court shall also have regard to such facts as the following in considering whether such maxims do or do not apply to the particular case before it :—

As to illustration (a)—A shop-keeper has in his till a marked rupee soon after it was stolen, and cannot account for its possession specifically, but is continually receiving rupees in the course of business.

As to illustration (b)—A, a person of the highest character is tried for causing a man's death by an act of negligence in arranging certain machinery. B, a person of equally good character, who also took part in the arrangement, described precisely what was done, and admits and explains the common carelessness of A and himself ;

As to illustration (b)—A crime is committed by several persons. A, B, and C, three of the criminals are captured on the spot and kept apart from each other. Each gives an account of the crime implicating D, and the accounts corroborate each other in such a manner as to render previous concert highly improbable :

As to illustration (c)—A, the drawer of a bill of exchange, was a man of business. B, the acceptor, was a young and ignorant person, completely under A's influence.

As to illustration (d)—It is proved that a river ran in a certain course five years ago, but it is shown that there have been floods since that time, which might change its course .

As to illustration (e)—A judicial act, the regularity of which is in question, was performed under exceptional circumstances.

As to illustration (f)—The question is, whether a letter was received. It is shown to have been posted, but the usual course of the post was interrupted by disturbances :

As to illustration (g)—A man refuses to produce a document which would bear on a contract of small importance

on which he is sued, but which might also injure the feelings and reputation of his family :

As to illustration (h)—A man refuses to answer a question which he is not compelled by law to answer, but the answer to it might cause loss to him in matters unconnected with the matter in relation to which it is asked :

As to illustration (i)—A bond is in possession of the obligor, but the circumstances of the case are such that he may have stolen it.

Note.—In the preceding sections, as the law directs on whom the burden of proof is to lie, the judge is bound in every instance to presume against the party on whom the burden of proof is directed to lie and no option is given to him as to whether he will presume the fact or not. Besides these obligatory presumptions in which the direct enactment of the law supersedes any reasoning process in the judge's mind, there is a large class of presumptions where room is still left for the judge to exercise his powers of inference, and where the rule of law merely assists the reasoning process by which the result in each case is arrived at. In these cases accordingly, the Judge can throw the burden of proof on whichever side he chooses by presuming the fact or by calling for proof of it in the first instance. Cases of this nature are dealt with in Sec. 114 which provides in effect that wherever the ordinary course of human events and the general tendency of human character render it probable, under the circumstances of the case, that a thing is true, the court is at liberty to presume its truth, or exempt the party asserting it from the necessity of proof in the first instance, and to throw upon the party who denies it the burden of showing that it is not true. Whether in any particular case it is safe to do so, is a question which the Judge must decide for himself according to his judgment. This is made clear by the illustrations. It is for example, likely in the natural course of things that a man, who is found in possession of stolen goods shortly after the theft and who cannot account

for their possession, has either stolen them or received them with a guilty knowledge. The court may, therefore, presume this to be so, if it thinks well. But cases may arise in which such a presumption would be most unfair. A marked rupee is traced to a shop-keeper's till; he can give no specific account as to how it got there, yet it need not even raise a suspicion against him. So, again, the court may presume, as being in accordance with the common course of things, that an accomplice is unworthy of credit; but there are cases in which, from the character of the parties and of the offence charged, the most implicit reliance may be placed on what an accomplice says. So again, the court may presume that evidence which might be and is not produced would be unfavourable to the party not producing it; but it might well be that special circumstances, as, for instance, family considerations, would prevent a party from calling a witness whose evidence would be in the highest degree favourable to his cause and it would be therefore, unfair to make the usual presumption. Such presumptions ought not therefore to be obligatory. In all these, and similar cases the Judge *may* presume; it is for him to decide whether or not he ought to do so. (C. & S).

Illustration (f)—A notice to quit was given by a registered post but the letter was returned by the post office, the addressee having refused to accept it. *Held*, that under Sec. 114 of the Evidence Act, the Court was entitled to presume that the letter containing the notice reached the defendant and the fact that the letter was returned by the post office as not accepted by the addressee did not destroy the presumption (23 C. W. N. 319; 24 C. W. N. 478; 54 I. C. 5). If a letter properly directed containing a notice to quit is proved to have been put into the Post Office, it is presumed that the letter reached its destination at the proper time according to the regular course of business of the Post Office and was received by the person to whom it was addressed. That presumption would apply with greater

force to registered letter. (46 Cal. 458, P. C. ; 23 C. W. N. 77. P. C.) When it is proved that a notice was sent by registered post and a postal acknowledgment purporting to have been signed by the addressee is produced and proved, the presumption is that the notice was served and in the absence of a rebuttal of this presumption, service should be held to have been proved. (33 C. W. N. 359) If a person refused to receive a registered letter addressed and tendered to him he must be held affected with knowledge of the contents of the letter which he refused to read. (50 I. C. 194). The tender to and refusal by the defendant of a cover sent by registered post and containing the notice to quit is sufficiently proved by the endorsement on the cover or envelope stating the defendant's refusal to receive that document. (17 C. W. N. 1073; 15 Cal. 681). But see 19 C. W. N. 489 and 48 I. C. 904. In the former case it has been held that proof of the fact that a letter correctly addressed has been posted and has not been received back through the Dead Letter Office may justify the presumption that it had been delivered in due course of mail to the addressee but proof of the fact that a letter correctly addressed and duly posted has been returned by the Postal authorities does not justify the presumption that it has been so returned because it has been refused by the addressee, for it may well be that it has been returned because the addressee has not been found. The presumption mentioned in S. 114 is not a presumption of law but a presumption of fact and where the defendant pledges his oath that the cover was never tendered to him, the presumption of regularity of official business cannot be treated as conclusive against him. In 48 I. C. 904, it has been held that where a defendant denies the receipt of notice alleged to have been sent to him through registered post, it is incumbent upon the plaintiff to call the post-peon to prove that the registered post card was tendered to and was refused by

the defendant. An endorsement on the cover of a registered letter that it had been tendered to the addressee on a certain day and had been refused by him, is at best a record of a statement by a person and where the peon is not examined, is not admissible in proof of the facts recited therein, unless evidence is produced to justify its reception in evidence under S. 32 (2) or 33 of the Evidence Act. (20 C. L. J. 455).

[Problem.]—A suit was instituted by A against B for ejectment from a house let to him. To prove service of notice on B, a registered cover, containing the notice, which was sent through Post Office but returned to A by the postal authorities, had been produced in the course of trial; there was no oral evidence to show that the cover was posted, nor the postal peon examined to prove when and where the cover was tendered to B. The only oral evidence on the subject was a statement by the agent of A, who pledged his oath that he had given notice by a registered cover. B on the other hand, asserted in the course of his deposition that the cover in question had never been tendered to him. Decide whether there was due service of notice on B or not. See above.]

C. U. 1921(a).

Illustration (g)—This illustration deals with the presumption which arises from withholding evidence and from the spoliation or fabrication or suppression of evidence. In a suit for accounts the non-production of the account books by the party who has custody of them justifies the presumption under S. 114 (c) that they have been withheld because if produced they would have been unfavourable to his case. (24 C. W. N.:110). The presumption does not, however, relieve the opposite party altogether from the burden of proving his case and though the fact of spoliation standing alone may defeat, it cannot, of itself, sustain a claim. (Lawson, 137; W. & A. 786).

[Problem:]—A sues B on a sum alleged to be due upon a settlement of account. Instead of finding and proving the account current between himself and B, A produces evidence to prove the admission of the debt. What risks, if any, does A run? See above and also notes under S. 22 ante].

C. U. '25(b).

CHAPTER VIII—Estoppel. (Ss. 115–117.)

This Chapter deals with the subject of estoppel so far as it bears on the law of evidence. In this Chapter, we have to consider a class of cases in which persons may, by their previous conduct have disqualified themselves from making particular assertions in giving evidence. The law has a right to require a certain degree of consistency in those who seek its aid, and therefore to specify the conditions under which a suitor shall not be allowed to put forward a claim or a ground of defence or to make an assertion, which is contradictory to something which he has on some former occasion said or done. This principle is known as estoppel. Under the English law a man may be estopped by the language of an instrument to which he is a party or of a record of legal proceedings, in which he was concerned, or by his own conduct in some transaction, from setting up, as against any person who was a party to that instrument or those proceedings or who was affected by that conduct, a contrary state of things. The following are the only estoppels which are known to the Indian law :—(1) Estoppel by declaration or conduct (S. 115). (2) Estoppel of tenant and licensee (S. 116). (3) Estoppel of acceptor of bill of exchange, bailee or licensee (S. 117). These three are the only cases in which a man is precluded by law from setting up what facts he pleases. Unless a case can be brought within these sections, the mere fact that a statement is contained in a deed, to which some person is a party, will not disable him from endeavouring to prove the contrary, though it may be evidence of an admission on his part and render it difficult for him to do so. (C. & S.)

Different kinds of Estoppels.—The English law divides estoppels into three classes, namely, (1) estoppels by record, (2) estoppels by deed and (3) estoppels *in pais*. This chapter is concerned with estoppels of the last kind (*i. e. in pais*) only.

Explain :—
Estoppel,
C. U. 21 (b),
All 1916.
How does an admission differ from an estoppel?
What are the various forms of estoppel?
All 1917.
State the provisions of the I. E. Act regarding estoppel,
Bom. 1916(8).
What do you understand by "Estoppel"?
Enumerate and illustrate the different kinds of Estoppel.
What is the main determining factor of each kind?
C. U. 1911(6),
Bom. 1901,
1918 (a).
What are the three classes of estoppel according to English Law and how many kinds of these are recognised in the I. E. Act?
Bom. 1893,
C. U. 21 (Suppl.),
Mad. 1916.
Explain the expression "estoppel by

matter in
pais." Bom.
1910 (a).
Explain the
doctrine of
Estoppel.
Bom. 1913(b).
What do you
understand by
the rule of
estoppel?
State and dis-
cuss the case
of Sarat
Chandra Dey
v. Gopal Ch
Laha.
C.U. 1919(a).
What is an
estoppel and
what are the
different kinds
of estoppel?
To what
extent and
under what
conditions
may negli-
gent conduct
on the part of
a person oper-
ate as an
estoppel
against him?
Bom. 1918(a).

Estoppel by Record.—Estoppel by matter of record usually arises from the judgment of a competent court. A judgment of a court of competent jurisdiction operates as an estoppel precluding the parties and their privies from again agitating the matters decided between them. This kind of estoppel is chiefly concerned with the effect of judgment and their admissibility in evidence and has been dealt with by Ss. 11-14, Civil Procedure Code and Ss. 40-44 of this Act.

Estoppel by Deed.—A party to a deed cannot in an action between him and the other party, set up the contrary of his assertion in that deed. Both parties and all claiming through or under them are bound by the language of the deed. (Powell). A deed is the most solemn and authentic act that a man can possibly perform, with relation to the disposal of property; and therefore a man shall always be estopped by his own deed or not permitted to aver or prove anything, in contradiction to what he has once so solemnly and deliberately avowed. (Blackstone). The strict technical doctrine of estoppel by deed can hardly be said to exist in British India. In this country, the art of conveyancing is of so simple and informal a character that estoppel by deed has been expressly discountenanced by the courts. But while technical doctrine has no application in this country, statements in documents are, as admission, always evidence against the persons who make them and may amount to estoppel, if they satisfy the provisions of S. 115 *i. e.*, if the statements have been acted upon by the party to whom it is made, (*Vide S. 31 ante*).

Estoppel in Pais.*—Estoppel by conduct was formerly called estoppel *in pais* or more fully estoppel *in pais dehors* the instrument (*i. e.*, with regard to matters outside a record

* *In pais* means "in the country" "before the public" (Field's Ev., 8th Ed. p. 689 foot note).

or deed). This class of estoppels obviously stand on a very different ground from the two preceding. To raise an estoppel by conduct a person must, by word or conduct, induce another to believe that a certain state of things exist, and so cause that other to act on that belief in a way he would not have done had he known the facts. Estoppel *in pais* according to the modern sense of that term has been said to arise *firstly*, from agreement or contract and *secondly*, independently of contract, from act or conduct or misrepresentation which has induced a change of position in accordance with the real or apparent intention of the party against whom the estoppel is alleged. The Act deals with the subject of estoppel *in pais* in Ss. 115-117, but does not in terms preserve the above-mentioned distinction between estoppel by *contract* and estoppel by *conduct*. Ss. 116 and 117 afford instances of the estoppels by contract or agreement but they are not exhaustive of it. Other cases of the same nature may be found to fall within the purview of S. 115 which, however, primarily appears to refer to what has been described as estoppels by conduct.

The rules of estoppel contained in Ss. 115-117 of the Evidence Act are not, however, exhaustive.* Cases of estoppel may, however, arise which are not within the purview of these sections. (33 Cal. 915). Estoppels in the sense in which that term is used in English legal phraseology are matters of infinite variety, and are by no means confined to the subjects which are dealt with in Ss. 115-117 (5 Cal. 669). Besides the rules of estoppel contained in Chapter VIII of the Indian Evidence Act the principle of estoppel has been codified in Ss. 98, 108, 234, 235, 237, 245 and 246 of the Indian Contract Act, S. 18 of the Specific Relief Act and Ss. 41 and 43 of the Transfer of Property Act.

* But in 35 Cal 904 it has been held that S. 115 is exhaustive and the law of estoppel in India is contained in that section.

Define
estoppel and
distinguish it
from presump-
tion. Mad.

1916,
1917 (b),
1919 (b).

State and
illustrate the
principle of
estoppel enun-
ciated by the
Judicial
Committee in
the case of
Sarat Ch. Dey
v. Gopal Ch.
Laha.
(20 Cal. 296)
C.U. 20 (b),
Mad. 1916.

Distinction between Estoppel and Presumption :

The subject of estoppels differs from that of presumptions in the circumstances that an estoppel is a personal disqualification laid upon a person peculiarly circumstanced from proving particular facts. A presumption is a rule that particular inferences shall be drawn from particular facts whoever proves them.

Distinction between Estoppel and Res Judicata

—*Res judicata* precludes a man from averring the same thing twice over in successive litigations, while estoppel prevents him from saying one thing at one time and the opposite in another. *Res judicata* ousts the jurisdiction of the court, while estoppel does no more than shut the mouth of a party. To put it colloquially and compendiously, estoppel never means anything more than that a person shall not be allowed to say one thing at one time and the opposite of it at another time while *Res judicata* means nothing more than that a person shall not be heard to say the same thing twice over. (36 Bom. 283).

Distinguish
between estop-
pel and ad-
mission.

Mad. 1919(b)

Discuss the
law of estop-
pel as codi-
fied in S. 115

I. E. Act,

C.U. 1912

(b), Bom.

1912 (b),

1908 (b),

1916 (b).

What is an
estoppel and
who are
bound by it ?
Give two ex-
amples.

C.U. 1916(a),
Mad. 1919(b),

Distinction between Estoppel and Admission

—See notes under S. 31 at p. 108 *supra*.

Definition of estoppel.—When one person has by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon that belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing. (S. 115).

Illustration—A intentionally and falsely leads B to believe that certain land belongs to A, and thereby induces B to buy and pay for it. The land afterwards becomes the property of A, and A seeks to set aside the sale on the

ground that at the time of the sale, he had no title. He must not be allowed to prove his want of title. *

Principle—The principle upon which the rule of estoppel rests is, that it would be most inequitable and unjust that if one person by a representation made or by conduct amounting to a representation has induced another to act as he would not otherwise have done, the person who made the representation should be allowed to deny or repudiate the effect of his former statement to the loss and injury of the person acted on it. "If there be one principle of law more clear than another, it is this, that where a person has made a deliberate statement with the view to induce another to act, and he has acted upon it the former is not a liberty to deny the truth of the statement so made" (*Per* Bramwell, B., 7H. & M. 447). Where a person by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his previous position, the former is precluded from averring against the latter a different state of thing as existing at the same time. (*Pickard v. Sears*, 6A. & E., 469). This doctrine results directly from the maxim that "*no man shall take advantage of his own wrong.*" A man is estopped when he has done or permitted some act which the law will not allow him to gainsay. Its foundation rests partly on the obligation to speak and act in accordance with truth by which every honest man is bound and partly on the policy of the law, which thus seeks to prevent the mischief that would inevitably result from uncertainty, confusion and want of confidence, were man permitted to deny what they had deliberately asserted. Therefore, every admission which had been made with the intention of being acted upon and

Bom. 1913 (b), 1915 (b) 1918 (b).

What is an estoppel? C.U. 1902, 1905, 1910(a), 1913(b), 1915 (a), 1914 (b).

What is the general rule of estoppel?

C.U. 1913 (b).

Discuss the principle upon which the rule of "estoppel" as laid down in S. 115 of the I. E. Act, rests. Give illustrations.

C. U. 1917 (a), 1907.

What do you understand by the rule of Estoppel?

A person professes to have permanent rights in property and on that basis grants a permanent lease. Discuss whether he should be permitted to prove subsequently as against the grantee that he was not competent to

* This illustration is an example of title by estoppel. S. 43 of the Transfer of Property Act and Sec. 18 of the Specific Relief Act, embody the rule of title by estoppel.

grant a permanent lease ?
C.U. 22 (a).
[No. See 48
Cal. 783 ;
A. I. R. 1928
Cal. 156].
To what
extent and
under what
circumstances
may the con-
duct of a
person operate
as an estop-
pel against
him ? Bom.
1918(a).
State fully the
circumstances
in which a
person is
estopped from
denying the
truth of his
previous re-
presentation.
C. U. 1909,
1915 (b).

which has been acted upon by another person, is conclusive against the party making it in all cases between him and the individual whose conduct he has thus influenced. (Taylor).

Essentials: To bring a case within the scope of S. 115 three things are necessary *viz.*—

(1) there must have been a declaration, act or omission which amounts to an intentional causing or permitting belief in another ;

(2) There must have been belief on the part of that other ; and

(3) There must have been action on the faith of that declaration, act or omission, that is to say, the declaration, act or omission must have actually caused another to act on the faith of it, and to alter his former position.

It is, however, necessary to bear in mind that a statement in order to create estoppel should be clear and unambiguous and should refer to some state of facts alleged to be at the time actually in existence and not to promise *de future* nor to propositions of law. It is also necessary to remember that there should be privity between the parties, that is to say, an estoppel is only available between the parties, to their representative and those claiming under them. But it is not essential that the intention of the person whose declaration, act or omission has induced another to act or to abstain from acting should have been fraudulent or that he should not have been under a mistake or misapprehension. The determining element in all cases of estoppel is not the motive with which the representation was made or the state of knowledge of the party making it, but the effect of the representation as having caused another person to act on the faith of it. (Banerjee's Ev. 324).

What general
conditions are
necessary to
the creation of

'Person'—It has been held by the Calcutta High Court in *Brahmo Dutt v. Dharmo Das Ghose* (26 Cal. 381) that the term "person" in S. 115 applies only to one who is

of full age and competent to enter into a contract and this section has no application to contracts by infants.* The Bombay High Court holds the contrary view. See 21 Bom 198, where it has been held that a minor who representing himself to be of full age sold certain property by a registered sale-deed which contained a recital that he was 21 years of age was estopped from suing to set aside the sale on the ground of his minority.

[**Problem.**—A lent a sum of Rs. 29,000 to B on the security of his properties. At the date of the mortgage B was a minor, *and A had knowledge of this fact*. B, however, at the time of executing the mortgage-bond made a declaration that he was a major. In a suit upon the mortgage bond, it was contended on behalf of B that he was a minor at the time of the mortgage and as such the mortgage was void. *Will B be estopped by his declaration from pleading his minority?* C. U. 1917 (b). **Ans.** No. There can be no estoppel where the truth of the matter is known to both parties. This section does not apply to a case like the present one where the statement is made to a person who knows the real facts and is not in fact misled by the untrue statement. (30 Cal. 539 P. C.).]

"Declaration, act or omission"—Estoppel may arise by (1) *declaration*, (2) *act* or (3) *omission*. In the Act the words "declaration, act or omission" have been used, but these words are covered by the expression "representation" as used by the English textwriters. The representation (*i.e.*, declaration, act or omission) may be express or implied; for whatever word, action or conduct conveys a clear

an estoppel? Bom. 1910(b) State correctly the circumstances in which a person is estopped from denying that a certain thing is true.

C. U. 1909. Does the doctrine of estoppel apply to infants? If so, under what circumstances and subject to what limitation?

Mad. 1919(b). What do you understand by "Estoppel"? Explain its principle and justification, giving reasons.

What in your opinion is the determining element of enforcing such principle in the case of estoppel by misrepresentation? C. U. 1910(a). How far is representation relating to a promise in fu-

* But the course of decisions in Calcutta is not uniform. *Vide* 29 Cal. 126, 15 C. W. N. 239 and 20 C. W. N. 418. From the decisions of the Calcutta High Court it seems that where there is fraud there can be an estoppel against an infant. For a full discussion on the subject see 2 C. W. N. pp. 171 and 178 (Notes).

ture binding
as an estop-
pel?

Bom. 1912(b).

impression as of a fact, is embraced in that term. There is no necessity for an express verbal statement or indeed any verbal statement whatsoever. An act may involve and amount to a distinct declaration which will found an estoppel. So if a man take an active part in carrying out a mortgage-deed on behalf of another as by signing the deed and receiving the consideration money, his acts may amount to declaration of the validity of the mortgage as against any claim of his own. So also a mere omission or silence may involve a representation. Thus silence where one is bound to speak is ordinarily equivalent to an admission of the fact. So if a person stands by and allows another to advance and expend money on property on which he has charge or encumbrance, he may be estopped by his conduct of acquiescence. [But assuming that acquiescence amount to a representation, it must be found that it was intended that a party should believe or act upon it or that in point of fact they did act upon it.] (W. & A).

Representa-
tion must be
unambiguous.

Representation must be unambiguous—To create an estoppel against a party, his declaration, act or omission must be of an unequivocal and unambiguous character. The representation must be plain, not doubtful or matter of questionable inference. Certainty is essential to all estoppels. An estoppel to have any judicial value, must be clear and non-ambiguous; it must also be free, voluntary and without any artifice.

Representa-
tion must be
as to existing
facts.

Representation must be as to existing facts.—To create an estoppel there must be a representation by means of a declaration, act or omission that a thing is true *i.e.*, that the representation is as to some state of facts alleged to be at the time, actually in existence. If the representation relates to a promise *de futuro*, it can be binding not as an estoppel but as a contract. (28 Bom. 399).

No estoppel
on a point of
law.

No estoppel on a point of law.—Estoppel refers to a belief in a *fact* and not in a proposition of *law*. A person

cannot be estopped for a misrepresentation on a point of law. An admission on a point of law is not an admission of a "thing" so as to make the admission matter of estoppel within the meaning of S. 115 of the Evidence Act. (21 All. 283).

Different circumstances under which estoppel arises.—The following four propositions laid down by Lord Esher in *Carr v. The London and North Western Ry. Co* (L. R. 10 C. P. 307) illustrate the various circumstances under which estoppel (*in pais*) can arise :—

(1) A, by words or conduct, wilfully endeavours to cause B to believe in a certain state of facts which A *knows* to be false. Then if B believes in that state of things and acts upon his belief, A having knowingly made a false statement, is estopped from averring afterwards that such a state of things did not in fact exist,

(2) A by conduct of culpable negligence calculated to lead B into the belief of a certain state of facts, causes B to so believe and to act by mistake upon such belief to his prejudice, such conduct of culpable negligence an A's part being the proximate cause of B's so acting. Then A cannot be heard afterwards, as against B, to show that the state of facts referred to did not exist.

(3) A, either in express terms or by conduct makes a representation to B of the existence of a certain state of facts which he either does not believe to be true or has no positive belief either way, but nevertheless he intends it to be acted upon in a certain way. B does so act to his damage in that belief. Then A is estopped from denying the existence of that state of things. •

(4) A so conducts himself that a reasonable man would take his conduct to mean a certain representation of facts intended to be acted on in a particular way. Then A may not deny that the facts were as represented.

Can mere silence ever amount to an estoppel? Give examples. All. 1916.

Write a note on the law of estoppel with special reference to a leading case. C.U. 1928(a). State the doctrine of Estoppel and discuss the principle underlying this doctrine with reference to a leading case on the subject.

C.U. 1927(a). What is the proposition of law laid down in *Sarat Chandra v. Gopal Ch.*? C.U. 1926(b). Determine the meaning of the word "intentionally" in Sec. 115 of the I. E. Act.

How has the word "intentionally" been explained by the Judicial Committee of the Privy Council in 20 Cal. 296 (*Sarat Ch. v.*

Estoppel by omission or silence.—There is estoppel by omission when a person is under an obligation to disclose all facts, *i.e.*, where the transaction is *uberima fidei*. When silence is of such a character and under such circumstances that it would be fraud upon the other party, for the party which has kept silence to deny what his silence has induced it will operate as an estoppel. (7 C. L. J. 604). A man is bound to speak out in certain cases, and his very silence becomes as expressive as if he has openly consented to what is said or done, and had become a party to the transaction. (9 All. 413). If a man having a title to an estate, which is offered for sale knowing his title stands by and encourages the sale or does not forbid it and thereby another person is induced to purchase the estate under the supposition that the title is good, the former so standing by and being silent will be bound by the sale and neither he nor his privies will be at liberty to dispute the validity of the purchase. (Story, 385). Silence without fraud cannot, however, operate as an estoppel.

This section does not apply to a case in which a belief has not been initially caused, but when otherwise caused has been only allowed to continue by reason of any omission on the part of the person against whom the estoppel is sought to be raised. (32 Cal. 362).

"Intentionally cause &c.....act upon that belief."—It must be found that the defendant by his act or omission intentionally caused or permitted another person to believe a thing to be true and to act upon such belief. It is not sufficient to say that it may be well doubted if the plaintiff would have acted in the way he did but for the way in which the defendant had acted. It must be found that the plaintiff would not have acted as he did, (6 Bom. L. R. 440; 7 All. 878).

"Intentionally".—The representation must have been made with the intention (actual or reasonably to be infer-

red) that it should be acted upon. Intent will be presumed if a party so conducts himself that a reasonable man would take the representation to be true, and believe that he was meant to act on it. A person who by his declaration, act or omission had caused another person to believe a thing to be true and to act upon this belief, must be held to have done so "intentionally" within the meaning of this section, if a reasonable man would take the representation to be true and believe it was meant that he should act upon it. (20 Cal. 269),

"To believe a thing to be true and to act upon such belief."—Sec. 115 of the Evidence Act requires that a declaration, act or omission which is to operate by way of estoppel, had led another person to *believe a thing to be true* and to *act upon such belief*. This section thus implies that no declaration, act or omission will amount to an estoppel, unless it has caused the person whom it concerns to alter his position and to do this he must both believe in the facts stated or suggested by it and must act upon such belief. (7 All 878). The main question in determining whether an estoppel has been created, is whether the representation has caused the person to whom it has been made to act on the faith of it. The representation and the action taken thereon must be connected as cause and effect *i.e.* the action and belief were materially, if not wholly, induced by the representation. Thus there can be no estoppel if the person to whom the representation was made did not believe it or took it to be false or if he believed it he did not act upon it or was under an obligation to make enquiries for himself, which he failed to do. Similarly, there can be no estoppel where the truth of matter is known to both parties. This section does not apply to a case where the statement relied upon is made to a person who knows the real facts and is not misled by the untrue statement. (30 Cal. 539 P. C.). What section 115 mainly regards is the position of the

Gopal
Chandra)?
C.U. 1918(a).

"The existence of estoppel does not depend on the motive or on the knowledge of the matter on the part of the person making the representation."

"A fraudulent intention is by no means necessary to create an estoppel." "An estoppel does not itself give a cause of action; it prevents a person from denying certain state of facts."

Discuss the above propositions with special reference to the case of Sarat Ch. Dey v Gopal Ch. Laha. C.U. 1919(b). Explain and discuss the principle underlying the

rule of estoppel with special reference to any leading case on the subject.

C.U. 1923 (b), 1925 (a).

"In order to create estoppel the person whose acts or declarations induce

another to act in a particular way must be under no mistake himself or must act with an intention to mislead or deceive."

Examine this doctrine with special reference to the case of *Sarat Chand Dey v. Gopal Ch. Laha*, 20 Cal. 206.

C.U. 1926(a). Is intention to deceive necessary to operate an estoppel?

C.U. 1915(b). P. acting under an error and without being actuated by any fraudulent motive induces Q to

person, who has induced to act. Unless the representation of the party to be estopped has been really acted upon, the other party acting differently from the way in which he would otherwise have acted, no estoppel arises. The person deceived must not only believe the thing to be true, but he must also act upon such belief so as to alter his own previous position, and where there has been no such action there can be no estoppel (2 N. L. R. 34). S. 115 of the Evidence Act does not apply to a case in which a belief, otherwise caused has been only allowed to continue by reason of any omission on the part of the person against whom the estoppel is sought to be raised. (32 Cal. 377).

Fraudulent intention not necessary to create estoppel.—It is not essential that the intention of the person making the representation which induces another to act must be influenced by a *fraudulent* intention or that he should have been under no mistake or *misapprehension*. The determining element is not the motive with which the representation has been made, nor the state of knowledge of the party making it, but effect of the representation as having caused another to act on faith of it. *Sec. 115 of the Evidence Act does not make it a condition of estoppel resulting that the person, who by his declaration or act has induced the belief on which another has acted was either committing or seeking to commit, a fraud or that he was acting with a full knowledge of the circumstances, and under no mistake or misapprehension.* What the law mainly regards is, the position of the person who was induced to act; and the principle on which the law rests is, that it would be most inequitable and unjust to him that if another by a representation made, or by conduct amounting to a representation, has induced him to act as he would not otherwise have done, the person who made the representation should be allowed to deny or repudiate the effect of his former statement, to the loss and injury of the person who acted on it.

If the person who made the statement did so without full knowledge, or under error, *sibi imputat*. It may in the result be unfortunate for him, but it would be unjust, even though he acted under error, to throw the consequences on the person who believed his statement and acted on it as it was intended he should do. No doubt, in certain cases, where estoppel is successfully pleaded against a party seeking to act at variance with his previous conduct or declarations on the faith of which another had acted, the original statement may have been made fraudulently ; but, *a fraudulent intention is by no means necessary to create an estoppel*. (*Sarat Ch. Dey v. Gopal Ch. Laha*, 20 Cal. 206).

"Neither he nor his representative."—A man is estopped not only by his own allegations, and acts but also by those of all persons through whom he claims. In technical language estoppels are usually binding upon both parties and privies. The privy stands in no better position than the party through whom he derives his title, and if the latter is not at liberty to contradict what he has formerly said or done the former is subject to a like disability.

An estoppel is not conclusive proof of any matter against all the world. Privy between the parties is necessary for an estoppel ; a stranger can neither take advantage of nor be bound by estoppel ; it is only parties and their representatives that can set it up and be bound thereby. (3 All. 805 ; 16 Cal. 137).

Instances of estoppel.—The Evidence Act specially provides for the following specific instances of estoppel :—

1. (a) **Estoppel of tenant.**—No tenant of immoveable property, or person claiming through such tenant, shall *during the continuance of the tenancy*, be permitted to deny that the landlord of such tenant had, *at the beginning of the tenancy*, a title to such immoveable property.

believe that a property belongs to the latter and to invest money on its improvement.

P. then finds out that the property really belongs to him. Would he be estopped from denying Q's title ?

C.U. 1912(a)
State the facts of the case of *Sarat Ch. v. Gopal Ch.*
I. L. R. 20 Cal. 290 and the law laid down by the Judicial Committee.
C.U. 1923(a)
Distinguish between estoppel and conclusive proof.
Mad. 1921(a).

What is the general rule of estoppel ?
What is the rule as regards tenants ?
C.U. 1905, 1902.

Can a tenant prove that the title of his landlord has ceased ?
C.U. 1915(b).

How far and under what circumstances are tenants and licensees permitted to deny the title of their landlord or licensor as the case may be ?

C.U. 1910(a).

What case of estoppel by contract are provided by Evidence Act ?

Bom. 1913(a).

State the rule of estoppel as regards a tenant and licensee under the I. E. Act Mad. 1921(a). What is an estoppel ? Discuss the rule of estoppel as between landlord and tenant.

C.U. 1923(a).

What do you understand by estoppel by misrepresentation and estop-

Note.—If A being in possession of land deliver the possession to B upon his request and upon his promise to return it with or without rent, at a specified time or at the will of A, B cannot be allowed, while still retaining possession, to dispute A's title, because to allow him to do so would be to allow him to work a wrong against A by depriving him of the advantage which his possession afforded him and with which he would not have parted but for the promise of B that he would hold it for him and in his place and stead.

"During the continuance of the tenancy."—The provision of S. 116 of the Evidence Act precludes a tenant only *during the continuance of the tenancy* from denying that the landlord had *at the beginning of the tenancy* a title to the property, the subject of the tenancy. The words of the section leave it open to the tenant to show that his landlord's title has subsequently expired. If the term of the lease has expired when a suit is brought, the tenant can dispute the title of the landlord.

"At the beginning of the tenancy."—These words only apply to cases in which the tenants are put into possession of the tenancy by the person to whom they have attorned, and not to cases in which the tenants have previously been in possession. (11 Cal. 519),

(b) **Estoppel of licensee of person in possession.**—No person who came upon immoveable property by the license of the person in possession thereof shall be permitted to deny that such person had a title to such possession *at the time when the license was given.* (S. 116).

2. Estoppel of acceptor of Bill of Exchange.

—(a) No acceptor of a bill of exchange shall be permitted to deny that the drawer had authority to draw such bill or to endorse it. (S. 117).

(b) But the acceptor of a bill of exchange may deny that the bill was really drawn by the person by whom it purports to have been drawn. (Expl. 1)

3. **Estoppel of bailee or licensee.**—(1) No bailee or licensee shall be permitted to deny that his bailor or licensor had, at the time when the bailment or license commenced, authority to make such bailment or grant such license. (S. 117).

(2) But if the bailee delivers the goods bailed to a person other than the bailor, he may prove that such person had a right to them as against the bailor. (Expl. 2).

Note.—The acceptance of a bill of exchange presented to the drawer for acceptance by the payee or his endorsee implies, on the part of the acceptor, his readiness and willingness to pay the sum mentioned in the instrument. Having thus signified his assent he cannot turn round and say that the drawer had no business to draw the bill or to endorse it; nor can a bailee or licensee deny that his bailor or licensor had, when the bailment commenced, authority to make it. This rule, however, is subject to the important exceptions that the acceptor of a bill may deny that the bill was really drawn by the person by whom it purports to have been drawn; and that a bailee may, if he delivers the goods bailed to a person other than the bailor and is sued by the bailor in respect of such delivery, plead that such other person has right to them as against the bailor.

• **[Problema.**—(1) An administrator *pendente lite* had retained as his remuneration more than he was entitled to claim and his accounts showing such amounts had been passed by the Court with the knowledge of the plaintiff and without any objection being taken by him. A suit brought by the plaintiff to recover from the said administrator such excess within the time allowed by law, is contended on the

estoppel by agreement? Give illustrations to explain your answer. C.U. 1927(b), 1926 (b).

Can a bailee be permitted to deny that the bailor had at the time of the bailment authority to make such bailment?

Can a bailee defend an action by the bailor for non-delivery of goods on the ground that he had delivered the goods to another person who was the real owner? All. 1915.

ground of estoppel. Is this plea of estoppel valid? C. U. 1921 (d). Ans. No. The passing of the accounts in the presence of the heirs did not stop the heirs from suing for the recovery of the extra commission retained by the administrator. The administrator was in a fiduciary position. (41 Cal. 771).

(2) In the case of a testamentary devise of a non-transferable occupancy holding is the heir-at-law debarred by the doctrine of estoppel from questioning its validity? C. U. 21 (a). No. A non-transferable occupancy holding cannot be the subject of a valid testamentary disposition. In the case of a testamentary devise of such a holding, the heir-at-law is not debarred by the doctrine of estoppel from questioning its validity. (42 Cal. 254; 18 C. W. N. 1290).

What do you understand by the Rule of Estoppel? Can an execution purchaser of an interest of a mortgagor deny the title of the mortgagee? C.U. 1924(b).

(3) A purchases an estate subject to a mortgage in execution-sale; can he deny the validity of the mortgage subject to which he made his purchase? (No). Does it make any difference if he has purchased the estate which is under mortgage but does not take it subject to the incumbrance? (Yes). C. U. 21 (b). If a person purchases an estate subject to a mortgage, whether under a voluntary conveyance or under a sale *in invitum* or if he undertakes to discharge it, he can not be heard to deny the validity of the mortgage subject to which he made his purchase. Where, however, the purchaser merely buys an estate which is under mortgage, but does not take it subject to the incumbrance nor undertakes to discharge it, he is not precluded from impeaching the validity of the mortgage. The distinction between the two classes of cases depends upon the question whether the property has been sold subject to the mortgage or whether mere notice of the alleged mortgage has been given in the proclamation of sale. The former contingency is provided for by Order 21, r. 62, the latter is contemplated by O. 21, r. 66 of the C. P. Code (47 Cal. 446).

(4) A representing that he has inherited a property on the death of his uncle induces B to purchase the same and pay the price. Thereafter the property is attached and sold in execution of a decree for money against A and purchased by C who obtains possession. In a suit by B to recover property from C, can the latter prove that at the time of the sale by A, the uncle was living and that he died just before the attachment? C. U. 1918 (b). [See S. 115 and illustration and notes thereunder and S. 43 Transfer of Property Act. A purchaser at a sale in execution of a money-decree is bound by the estoppel which binds the judgment-debtor, whose interest he has purchased. (22 Cal. 909 P. C., 35 Cal. 877; 10 C. L. J. 150; *contra* 14 Cal. 401)].

CHAPTER IX. —Witnesses. (Ss. 118-134).

The present chapter deals with the following topics :—

A.—Competency of witnesses to give evidence. (Ss. 111, 120 and 133).

B.—Number of witnesses (S. 134).

C.—Compellability of witnesses to give evidence (Ss. 121-132).

State the law relating to competency and compellability of witness.
Mad. 1919(b),
1921(a);
All. 1919.

A.—Competency of Witnesses.

Who are competent witnesses—1. (1) All persons are competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind. (S. 118).

Who, under the I. E. Act, are competent to testify to judicial proceedings? C.U. 1913(a). What matters would you take into consideration in estimating (a) the capacity of and (b) the credit due to, a witness? C.U. 1900. Discuss whe-

Note.—The tendency of modern legislation has been rather to allow the witness to make his statement, leaving its truth to be estimated by the tribunal, than to reject his testimony altogether. Competency is thus the rule, and incompetency the exception. Proceeding on this principle,

ther want of religious belief in a witness is sufficient ground for rejecting his testimony.
C. U. 20(b)

the Evidence Act declares all persons to be competent witnesses except such as are wanting in *intellectual* capacity.*

Mr. Best observes. "The only grounds on which the evidence of a witness can, with any appearance of reason, be rejected unheard are reducible to four :—(1) That he has not that degree of intellect which would enable him to give a rational account of the matters in question ; (2) that he cannot or will not guarantee the truth of his statements by the sanction of an oath or what the law deems its equivalent ; (3) that he has been guilty of some crime or misconduct showing him to be a person on whose veracity reliance would most probably be misplaced ; (4) that he has a personal interest in the success or defeat of one of the litigant parties. In a word, his rejection should be based on the reasonable apprehension arising from known circumstances, that his evidence may mislead the tribunal and to cause misdecision." (*Best on Ev.* 134). Under the Indian Evidence Act in determining the competency of a witness, the only point for consideration is whether the witness can understand the questions put to him and give rational answers therefor. The other grounds of incompetency mentioned by Best may be considered in weighing the value of the evidence. In the English law, three of the four grounds of incompetency mentioned above still exist namely (1) incompetency from want of reason and understanding, (2) incompetency from want of religion and (3) incompetency from interest.

In determining the question of competency the Court under S. 118 of the Evidence Act, has not to enter into enquiries as to the witness's belief or as to his knowledge of the consequences of falsehood in this world or next. It

* Under this section, a child is competent to testify, if it can understand the question put to it, and give rational answers thereto. In England, a child to be a competent witness, must believe in punishment in future state for lying. (*W. Stokes*).

has to ascertain in the best way it can, whether from the extent of the intellectual capacity and understanding, he is able to give a rational account of what he has seen or heard or done on a particular occasion. If a person of tender years or of very advanced age, can satisfy these requirements, his competency is established. (11 All. 183).

(2) **Lunatics.**—A lunatic is not incompetent to testify unless he is prevented by his lunacy from understanding the questions put to him and giving rational answer. (Expl. to S 118).

Can a lunatic and a dumb person be competent witness? C.U. '26(a).

2. **Dumb witnesses.**—A witness who is unable to speak may give his evidence in any other manner in which he can make it intelligible, as by writing or by signs; but such writing must be written and the signs made in open Court. Evidence so given shall be deemed to be oral evidence. (S 119).

When can a witness be allowed to answer questions in writing?

Note.—Deaf and dumb persons were formerly excluded as witnesses on the presumption of their idiocy. But now, if it can be shown that a person deaf and dumb can be communicated with either by signs and tokens or by writing and it appears that he is possessed of intelligence, he may be examined as a witness.

3. **Husband and wife**—In all civil proceedings the parties to the suit and the husband or wife of any party to the suit shall be competent witnesses. In criminal proceedings against any person, the husband or wife of such person, respectively, shall be a competent witness. (S. 126).

Note.—The provisions of this section must be read subject to S. 123. In civil proceedings, the parties and the husband or wife of any party to the suit are competent witnesses. This is in accordance with the English law. In criminal proceedings, the accused person is not a competent witness. So far the section follows the English law. But

Discuss the rule that a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice, All, 1915

Explain "approver" Bom, '16(b). What is the law regarding the evidence of an accomplice? Bom, '14(b). Compare the confession of a co-accused with the testimony of an accomplice, Mad, 1917(b) "The unsupported evidence of an accomplice is legally admissible, but it is usual for a Judge to tell a jury that they are not to believe it." Develop. C.U. 1916(b). 1914(b). Bom. 1920(a) & (b). What is an accomplice?

in so far as it allows the husband or wife of the accused person to give evidence the section departs from the English common law. (6 W. R. Cr. 21, *F. B.*).

4. **Accomplice.**—An accomplice shall be a competent witness against an accused person; and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice. (S. 133).

Confession of co-accused and testimony of accomplice.—See note under S. 30 at pp. 124-25 *supra*.

Accomplice.—An accomplice is one concerned with another or others in commission of a crime. (Wharton). When an accomplice is granted pardon under S. 337 Cr P. C. he is called an "approver."

Note.—This section should be read with ill. (b) to S. 114 which provides that the Courts *may* presume that "an accomplice is unworthy of credit unless he is corroborated in material particulars." Although Sec. 133 emphatically and in unmistakable terms lays down that a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice, yet the Court should have regard to ill. (b) to Sec. 114 which has become a rule of practice of, universal application. The testimony of accomplices who are always interested and nearly always infamous witnesses is admitted from necessity, it being often impossible without having recourse to such evidence to bring the principal offenders to justice. But accomplice evidence is generally held to be untrustworthy and that for three reasons:—(1) because an accomplice is likely to swear falsely in order to shift the guilt from himself; (2) because an accomplice as a participator in crime and consequently as an immoral person, is likely to disregard the sanction of an oath; and (3) because he gives his evidence under promise of pardon or in the expectation of an implied pardon if he discloses all he knows against those with whom he

acted criminally, and this hope would lead him to favour the prosecution. Therefore, as a general rule, confirmation of the evidence of an accomplice is required. The rule in S. 114, ill. (b) and that in S. 133 are part of one subject and neither section can be ignored in the exercise of judicial discretion. As the presumption allowed by ill. (b) to S. 114, that an accomplice is unworthy of credit, unless he is corroborated in material particulars, has become a rule of practice of almost universal application it should not be departed from, if it be not clearly shewn that there exist circumstances justifying the exceptional treatment of the case. Taylor in his *Law of Evidence* observes: "Some few general propositions in regard to matters of fact and of the weight of testimony are now universally taken for granted in the administration of justice and sanctioned by the usage of the Bench. Such for instance, is the caution given to juries to regard with distrust the testimony of an accomplice, unless it be materially confirmed by other evidence." Straight, J. in the case of *Queen-Empress v. Ram Saran* (8 All. 306) observed: "The law in this country, as expressed in Ss. 133 and 114 of the Evidence Act is in no respect different from the law of England. It simply reproduces a rule of practice which the English courts have recognised from time out of mind, and which I may add, the tendency of late years have been to apply with great strictness. The rule is this: A conviction based on the uncorroborated testimony of an accomplice is not *illegal i. e.*, it is not unlawful. But experience teaches us that it is not safe to rely upon the evidence of an accomplice unless it is corroborated; and hence it is the practice of the courts both in England and in India, when sitting alone, to guard their minds carefully against acting upon such evidence when uncorroborated; and when trying a case with a jury, to warn the jury that such a course is unsafe." Jardine J. in the case of *Queen-Empress v. Chagan Dayaram* (14 Bom. 331) remarked: "So long established a rule of State and discuss the law of evidence of accomplices. Bom. 1909(a), Mad. 1918(b), Reconcile Sec. 133 with Ill (b) of Sec. 114. C.U. 1611(a). "An accomplice is unworthy of credit unless he is corroborated in material particulars." Does this proposition find support in the rule laid down in the I. E. Act, (S. 133) relating to the testimony of accomplices? Give reasons for your answer. C.U. '19 (b). State the necessity for admitting the evidence of an accomplice? Can the previous statement of an approver made to a police be used to corroborate his evidence at the trial? C.U. 21(a).

What is the ground upon which the evidence of an accomplice is admitted?

Mad. 1917(6).

practice as that which makes it prudent, as a general rule, to require corroboration of accomplices, cannot without great danger to society, be ignored by the Magistrates and Sessions Judges, simply because S. 133 of the Indian Evidence Act declares that a conviction is not illegal, merely because it proceeds upon the uncorroborated testimony of an accomplice."

B.—Number of Witnesses.

Discusses the Question of the quantity of evidence required for judicial decision in India in civil and criminal cases and compares the provision made in the I.E. Act with the English law on the subject.
Bom. 1905.

How many witnesses are required to prove a fact.—No particular number of witnesses shall in any case be required for the proof of any fact. (S. 134)

Note.—This section is based on the maxim that "evidence is to be weighed and not numbered." Under the English law, however, a person can not in certain cases (*e. g.* perjury, treason etc.) be convicted on the testimony of a single witness.

That judicial decisions should be based on the intelligence and credit of witnesses, and not on their numerical strength or on the volume of documents produced is no doubt a wise rule. If any inflexible rule be laid down that no decision should be based on the testimony of a single witness, many crimes would go unpunished, and just claims disregarded. It would obviously create an obstacle to the administration of justice, especially in cases where the acts to be proved are of casual nature. It is not uncommon to find cases of exceptional character whereby only one witness could be had, and there is no reason why judgment should not proceed, if the judge or the jury puts credence in his testimony." (Best).

C.—Compellability of Witnesses.

State what questions, though legitimate in

Secs. 121-131 declare exceptions to the general rule that a witness is bound to state the whole truth or to produce any document in his possession or power relevant to the

matter in issue. As a general rule all witnesses competent to give evidence are compellable to do so. But a witness who may be generally compellable to give evidence may be yet *protected* or *privileged* in respect of particular matters concerning which he may be unwilling to speak. Further there are certain cases in which the law will not permit the witness to speak even if he be willing. These rules of privilege and prohibition rest on grounds of public policy and are as follow :—

1. **Judges and Magistrates.**—No Judge or Magistrate shall, except upon the special order of some court to which he is subordinate, be *compelled* to answer any questions as to his own conduct in court as such Judge or Magistrate or as to anything which came to his knowledge in court as such Judge or Magistrate* But he may be examined as to other matters which occurred in his presence whilst he was so acting.† (S. 121).

Illustrations.—(a) A, on his trial before the Court of Sessions, says that a deposition was improperly taken by B, the Magistrate. B can not be compelled to answer questions as to this, except upon the special order of a superior Court.

(b) A is accused before the Court of Sessions of having given false evidence before B, a Magistrate. B cannot be asked what A said, except upon the special order of the superior Court.

(c) A is accused before the Court of Sessions of attempting to murder a police officer whilst on his trial before B a Sessions Judge. B may be examined as to what occurred.

Note.—This rule is based on the general grounds of convenience (*i.e.*, inconvenience of withdrawing a Judge from his own court) and of public policy. This section

What privileges can be claimed by Judges if called as witnesses? Bom. 1915(a). What are privileged communications? State the circumstances under which the privilege can be claimed? Bom. 1913(a) 1912 (a). Specify the nature of the personal privilege conferred by the English law on witnesses declining to answer particular questions. Point out the differences if any between English and Indian laws on the subject.

* *Vide* ill. (a) and (b).

† *Vide* ill. (c).

Mad. 1915.
From what
questions will
a witness be
excused or
protected by
the Court?

Bom. 1912(a).
What are the
privileged
communica-
tions?

Bom. 1912(a),
1912 (b),
1917 (a).

State in detail
the circum-
stances under
which the
I. E. Act ex-
cuses wit-
nesses from
answering
questions put
to them in
Court.
Bom. 1894.

What commu-
nications are
witnesses not
permitted or
compelled to
disclose?
Compare the

exempts a Judge from the obligation to answer questions (1) as to his own conduct in court and (2) as to thing which have come to his knowledge in court. Privilege of the Judge or Magistrate extends only "*to his own conduct in court as such Judge or Magistrate or as to anything which came to his knowledge as such or Magistrate.*" [*Vide* ill. (1) and (b)]. With regard to things not coming to his knowledge in Court as Judge, a Judge is as competent and as compellable a witness as any other person. (*Vide* ill (c)).

The privilege given by this section is the privilege of the witness *i. e.* of the Judge or Magistrate of whom the question is asked. If he waives such privilege or does not object to answer the question, it does not lie in the mouth of any other person to assert the privilege. (3 All. 573, F. B.).

2. Communication during marriage.—No person who is or has been married shall be *compelled* to disclose any communication made to him during marriage by any person to whom he is or has been married. Nor shall he be *permitted** to disclose any such communication unless the person who made it or his representative-in-interest consents—except in (i) suits between married persons or (ii) proceedings in which one married person is prosecuted for any crime committed against the other. (S. 122).

Note.—While husbands and wife are according to S. 120 competent witness against each other, neither can be compelled to divulge any communication made by one to the other during marriage. No husband shall be compelled to disclose any communication made to him by his wife during the marriage and no wife shall be compellable

* That is, where one of the spouse is willing to disclose a communication, he or she shall not be allowed to disclose it unless the person who made it or his representative-in-interest consents, except in suits or prosecution between married persons.

to disclose any communication made to her by her husband during the marriage. This rule rests on the obvious ground, that the admission of such testimony would have a powerful tendency to disturb the peace of families, to promote domestic broils, and to weaken, if not to destroy, that feeling of mutual confidence, which is the most endearing solace of married life.

The protection is not confined to cases where the communication sought to be given in evidence is of a strictly confidential character, but the seal of the law is placed upon all communications of whatever nature which pass between husband and wife. It extends also to cases in which the interest of strangers are solely involved, as well as to those in which the husband or wife is a party on the record. It is, however, limited to such matters as have been communicated *during the marriage*. A communication made to a woman before marriage would not be protected. But the privilege continues even after the marriage has been dissolved by death or divorce.

Scope of the section.—This section protects the individual and not the communication, if it can be proved without putting into the box for that purpose the husband or the wife to whom the communication was made. Consequently a document even though it contains a communication from a husband to a wife or *vice versa* in the hands of third person, is admissible in evidence; for in producing it there is no compulsion on or permission to the wife or husband to disclose any communication. (22 Mad. 1).

3. **Evidence as to affairs of State.**—No one shall be *permitted* to give any evidence derived from unpublished official records relating to any affairs of State, except with the permission of the officer at the head of the department concerned, who shall give or withhold such permission as he thinks fit. (S. 123).

English and the Indian Laws as to the admissibility of a wife's evidence for or against her husband in civil and criminal cases? Bom. 1896, 1921 (b).

Is there any difference between a compellable and a competent witness? In a criminal trial in India is a wife a compellable or competent witness against the husband? Does the common law rule in England differ from the rule in India? All. 1917

What privileges can be claimed by married persons if called as witness? Bom. 1915(a). Compare the English and

Indian Laws
as to the
extent to
which the
husband and
wife are com-
petent witnes-
ses for or
against each
other in
criminal
cases.

Mad. 1918(b),
1919 (b).

What are the
rules of evi-
dence relating
to affairs of
state and
official com-
munications?
Bom. 1911(b).
What privi-
leges can be
claimed by
police officers
if called as
witnesses?

Bom. 1915(a).

What is the
liability of a
witness to
give evidence?

How far
actions lie
against a
witness for
statements
made in
Court? How
far his privi-
lege protects
him to decline
to give
evidence?

C.U. 1923(a).

Note.—The laws of every country suppress much evidence that would be relevant or even conclusive, where its reception would involve the disclosure of matters of permanent importance which public policy and social order require to be concealed, such as secrets of State &c. This section exempts only *unpublished* official records relating to any affairs of State except with the permission of the head of the department. Without his permission the document cannot be produced and it is not required that he should give any reason for withholding his permission. Under the provision of this section the Judge is bound to accept without question the decision of the public officer referred to. This view is confirmed by S. 169, which forbids the Judge even to inspect the document. (Markby).

4. **Official communications.**—No public officer shall be *compelled* to disclose communications made to him in official confidence, when he considers that the public interest would suffer by the disclosure. (S 124).

Note.—On the grounds of public policy, official transaction between the heads of departments of Government and their subordinate officers and communications relating to State matters made by one officer of State to another in the course of his official duty are treated as secrets of State and are absolutely privileged.

Ss. 123 and 124 compared.—S. 124 is confined to public officers; S. 123 embraces every one. S. 123 leaves the discretion with the head of the department. S. 124 makes the officer himself the judge of the propriety of waiving the privilege. S. 123 is confined to *unpublished* record; S. 124 has no such restriction. (Norton).

5. **Information as to commission of offence.**
—(1) No Magistrate or Police officer shall be *compelled* to say whence he got any information as to

the commission of any offence; and no Revenue-officer shall be compelled to say whence he got any information as to the commission of any offence against the public revenue. (S. 25).

2) "Revenue-officer" in this section means any officer employed in or about the business of any branch of the public revenue. (Expl.)

Note.—While it is perfectly right that all opportunities should be afforded to discuss the truth of the evidence given against a prisoner, on the other hand, it is absolutely essential to the public welfare that the names of parties who give information should not be divulged; for otherwise—be it from fear, or shame or the dislike of being publicly mixed up in enquiries of this nature—few men would choose to assume the disagreeable part of giving information respecting offences and the consequence would be that many great crimes would pass unpunished. (W. & A.).

No Magistrate &c. shall be compelled &c.—Although the section does not in express terms prohibit a witness, if he be willing, from saying whence he got his information, the protection afforded by this section does not depend upon a claim of privilege being made, but it is the duty of the Court, apart from objection taken, to exclude such evidence. (40 Cal. 898).

6 Professional communications.—(1) No barrister, attorney, pleader or vakil shall at any time, be permitted, unless with his client's express consent—

(i) to disclose any communication made to him in the course and for the purpose, of his employment as such barrister, pleader, attorney, or vakil by or on behalf of his client; or

(ii) to state the contents or condition of any document with which he has become ac-

Explain fully giving examples and citing cases how far professional communications are privileged and when a

party is said
have waived
privileges.
Bom. 1909(b)
What profes-
sional profes-
sional commu-
nications
between a
party and his
legal adviser
are protected
from
disclosure ?
Bom. 1891,
1912 (b),
1915 (a).

quainted in the course and for the purpose
of his professional employment ; or

- (iii) to disclose any advice given by him to his
client in the course and for the purpose of
such employment (S. 126).
(2) But nothing in this section shall protect
from disclosure—
(a) any such communication made in further-
ance of any illegal* purpose† ;
(b) any fact observed by any barrister, pleader,
attorney or vakil, in the course of his employment
as such, showing that any crime or fraud has been
committed, since the commencement of his employ-
ment.‡

(3) It is immaterial whether the attention of
such barrister, pleader attorney or vakil was or was
not directed to such fact by or on behalf of his
client. (Proviso).

(4) The obligation stated in this section conti-
nues after the employment has ceased. (Expl.)

Illustrations.—(a) A, a client says to B, an attorney. "I
have committed forgery and I wish you to defend me." As
the defence of a man known to be guilty is not a criminal
purpose, this communication is protected from disclosure.

(b) A, a client says to B, an attorney—"I wish to obtain
possession of a property by the use of a forged deed on
which I request you to sue." The communication being
made in furtherance of a criminal purpose is not protected
from disclosure.

C.U. '26(a).

(c) A, being charged with embezzlement retains B, an
attorney, to defend him. In the course of the proceedings, B

* Under the English law the purpose must be "criminal" and not merely
'illegal'

† Vide III. (b)

‡ Vide III. (c)

observes that an entry has been made in A's account book charging A with the sum said to have been embezzled, which entry was not in the book at the commencement of his employment. This being a fact observed by B in the course of his employment, showing that a fraud has been committed since the commencement of the proceedings, is not protected from disclosure

Note.—The rule is founded on the impossibility of conducting legal business without professional assistance and on the necessity, in order to render that assistance effectual, of securing the fullest and most unreserved communications between the client and his legal advisers.

To make the section applicable it must *firstly* be shown that the communication was made when the relation of legal adviser and client existed. [It is not, however, necessary that there should have been any formal engagement or retainer; it is enough if the legal adviser be in any way consulted in his professional character]; *secondly*, the communication must have been made to the legal adviser *in the course, and for the purpose, of his professional employment*. [It is not every communication made by a person to his legal adviser that is privileged from disclosure. The privilege extends only to communications made to him confidentially and with a view to obtain professional help. A pleader cannot claim the privilege under this section, against disclosing statement made to him by a person, if the same is not made to him in the course and for the purpose of his employment as a pleader. (4 Bom. L. R. 460)].

• **"Unless with his client's express consent."**—The rule has been established for the protection, not of the legal adviser, but of the client and the privilege therefore may only be waived by the latter. The privilege is the privilege of the client and not of the professional adviser who is therefore bound to claim the privilege unless the client has waived it, which it is open for him to do. The client may

Distinguish between "competency" and "compellability" to give evidence. Illustrate the above with reference to (1) the position of an accused person and the wife or husband of such person in English Law and (2) the position of a legal adviser with regard to communications from his client under the I. E. Act. Mad. '16.

expressly waive the privilege or *impliedly* under 'the latter portion' of S. 128 by calling the barrister, pleader, etc. as witness and questioning him on matters which, but for such question, he would not be at liberty to disclose. But he does not lose the privilege if he gives evidence in the suit either at his instance or at the instance of the opposite party. (S. 128).

Proviso.—The proviso is intended to prevent the privilege from becoming a shield for fraud. It is not part of a lawyer's business to aid his client in the furtherance of an unlawful purpose and therefore when it appears that the lawyer was consulted with that view, he is bound like an ordinary witness to testify to the matters disclosed to him.

Duration of the privilege.—The protection does not cease with the termination of the suit or other obligation or business in which the communications were made; nor is it affected by the party's ceasing to employ the solicitor, and retaining another nor by any other change of relation between them, nor by the solicitor being struck off the rolls, nor by his becoming personally interested in the property, to the title of which the communication related nor even by the death of the client" (Taylor, S. 297).

(5) The provisions of this section (S. 126) shall apply to interpreters, and the clerks or servants of barristers, pleaders, attorneys and vakils. (S. 127).

Note.—Privilege given by S. 126 to legal advisers is, by the provisions of this section, extended to interpreters etc. S. 127 of the Evidence Act extends to a communication made to the pleader's clerk the same confidential character that attaches to a communication to a pleader direct under S. 126. (25 Cal. 53).

(6) **Privilege not waived by volunteering evidence.**—If any party to a suit gives evidence therein at his own instance or otherwise, he shall not be deemed to have consented thereby to such

When a party is said to have waived privilege?
Bom. '09 (a).

disclosure as is mentioned in S. 126 ; and if any party to a suit or proceeding calls any such barrister, pleader, attorney or vakil as a witness, he shall be deemed to have consented to such disclosure only if he questions such barrister, attorney or vakil on matters which, but for such question, he would not be at liberty to disclose. (S. 128).

Note.—A party to a suit does not waive his privilege by coming forward to give evidence, nor is he for that reason bound to produce confidential correspondence that has passed between himself and his legal adviser, except so far as it may be necessary for the due explanation of his evidence. Furthermore, the calling of his legal adviser as a witness does not imply a waiver, unless, of course, questions inconsistent with the maintenance of the privilege are put by him or on his behalf to the witness (Cunn).

7. Confidential communications with legal adviser.—No one shall be compelled to disclose to the court any confidential communication which has taken place between him and his legal professional adviser, unless he offers himself as a witness in which case he may be compelled to disclose any such communications as may appear to the court necessary to be known in order to explain any evidence which he has given, but no others. (S. 129).

Note.—Ss. 126 and 127 apply where the legal adviser or his clerk &c. is interrogated. S. 129 applies where the client himself is interrogated and whether such client be a party to the case or not "As S. 126 imposes a restriction on the legal adviser, so by the present section an exemption or privilege is extended to the client, the client being the object aimed at in both the sections alike. The present section lays down two conditions :—(1) the communication must be confidential and (2) the recipient of it must be the

man's professional legal adviser (*i. e.*, the barrister, attorney, pleader or *vakil* mentioned in S. 126). The protection of the client extends to all communications between lawyer and client in regard to matter on which the lawyer is consulted whether they took place before or after the commencement of the dispute. Privilege may be claimed in regard to paper containing such statements or advice when application is made in a suit for the inspection of documents. (Cunn).

(8) Production of title-deeds of witness not a party.—No witness who is not a party to a suit shall be compelled to produce—

- (i) his title-deeds to any property ; or
- (ii) any document in virtue of which he holds any property as pledgee or mortgagee ; or
- (iii) any document the production of which might tend to criminate him, unless he has agreed in writing to produce them with the person seeking the production of such deeds or some person through whom he claims. (S. 130).

State briefly the provisions of the I. E. Act with reference to production of title deeds by a witness.
C.U. 1903.
[*Vide* S. 162, also.]

Note.—Under this section a witness who *is not a party to a suit* cannot be compelled to produce his title-deeds etc. Under Order XVI, R. 6, C. P. Code, 1908, any person may be summoned to produce a document, without being summoned to give evidence. S. 162 of this Act says that a witness summoned to produce a document must bring it to court, notwithstanding any objection which there may be to its production and the validity of any such objection shall be decided by Court. Reading all these sections together, it seems clear that a witness summoned to produce a document must bring it to Court ; and if he claims privilege under this section, and objects to its production the validity of his objection shall be decided by the Court. (Sarkar's Evidence Act). In a case to which this section would apply,

it would be entirely optional for the witness to produce his title-deeds and to raise any objection whatever. (16 All. 100).

9. Production of documents in possession which another person could refuse to produce.—No one shall be compelled to produce documents in his possession, which any other person would be entitled to refuse to produce if they were in his possession, unless such last-mentioned person consents to their production. (S. 131).

Note.—This Section extends to the *agent*, the same protection which the preceding section provides for the *principal*. S. 130 relates to the case in which the document is the title-deed of the witness, while S. 131 refers to documents of another person in possession of the witness. This section is introduced for the protection of persons whose title-deeds and other documents happen to be in possession of his attorney, muktear, agents or servants, trustees, and mortgagees &c. In such a case the consent of the owner of the documents would be necessary before a person can be compelled to produce them. When the consent of the owner has been given, the holder cannot resist an order for production, unless in his own right also he has a claim on the documents which brings the case within S. 130. In the absence of such consent the holder has, so far as S. 131 is concerned, discretion to produce them or not as he pleases. If he refuses production it is not incumbent on him to show that he is acting in obedience to the instructions of the person interested. On the other hand there is nothing, except his sense of duty, to prevent him from producing the document in spite of that person's instruction. (Cunningham).

10. Criminating questions to witnesses.—
(1) A witness shall not be excused from answering any question as to any matter relevant to the matter in issue in any suit or in any civil or criminal proceeding, upon the ground that the answer to

such question will criminate, or may tend (directly or indirectly) to criminate, such witness or that it will expose or tend (directly or indirectly) to expose such witness to a penalty or forfeiture of any kind : (S. 132).

Can a witness be excused from answering any question upon the ground that the answer will criminate him? What are the provisions of the Indian Evidence Act on the point? C.U. 1920(a). State the nature of question, which a witness can refuse to answer on the ground that it might tend to criminate him.

C.U. 1914(a).

(2) But no such answer, which a witness shall be compelled to give, shall subject him to any arrest or prosecution or be proved against him in any criminal proceeding except prosecution for giving false evidence by such answer. (Proviso).

Note.—Under this section a witness cannot refuse to answer a question which is *relevant to the matter in issue* in any civil or criminal proceeding simply on the ground that the answer will tend to criminate him or expose him to a penalty or forfeiture. The legislature while depriving the witness of the privilege which still exists in England has added a proviso to the section declaring that, such incriminating answers will not subject the witness to any arrest or prosecution or be proved against him in any criminal proceeding except in a case of a prosecution for giving false evidence. In England the witness is still privileged from answering incriminating questions.

“Questions as to any matters relevant to the matter in issue.”—This section does not in terms deal with all criminatory questions which may be addressed to a witness, but only with *questions as to matters relevant to the matter in issue*. Irrelevant questions should not be allowed and it may be implied from the limitation in this section that a witness should be excused from answering questions tending to criminate as to matters which are *irrelevant*. (1 Mad. 271).

“Answer which a witness shall be compelled to give etc.”—This section makes a distinction between those cases in which a witness *voluntarily* answers a question and those in which he is *compelled* to answer, and gives him

a protection in the latter of these cases only. Protection is afforded only to answers which a witness has objected to give or which he has asked to be excused from giving, and which then he has been compelled by the court to give. (12 Bom. 450). The words "shall be compelled to give" in the proviso, apply to pressure put upon a witness after he is in the box, and when he asks to be excused from answering a question. (21 Cal. 202).

CHAPTER X—Examination of witnesses.

(Ss. 135-166).

We now proceed to the consideration of the mode in which witnesses should be examined. Chapter X lays down the following provisions relating to the examination of witnesses : —

1. Order of production of witnesses for examination.—The order in which witnesses are produced and examined shall be regulated by the law and practice for the time being relating to civil and criminal procedure, respectively, and, in the absence of any such law, by the direction of the Court. (S. 135).

2. Rules as to the admissibility of evidence.
—(1) When a party proposes to give evidence of any fact the Judge may ask him in what manner the alleged fact, if proved, would be relevant ; and the Judge shall admit the evidence if he thinks that the fact if proved, would be relevant and not otherwise.

(2) If the fact proposed to be proved is one of which evidence is admissible only upon proof of some other fact, such last-mentioned fact must be proved before evidence is given of the fact first-mentioned, unless the party undertakes to give

proof of such fact, and the court is satisfied with such undertaking.*

Illustrations.—(a) It is proposed to prove a statement about a relevant fact by a person alleged to be dead, which statement is relevant under S. 32. The fact that the person is dead must be proved by the person proposing to prove the statement before evidence is given of the statement.

(b) It is proposed to prove, by a copy, the contents of a document said to be lost. The fact that the original is lost must be proved by the person proposing to produce the copy before the copy is produced.

(3) If the relevancy of one alleged fact depends upon another alleged fact being first proved, the Judge may, in his discretion, either permit evidence of the first fact to be given before the second fact is proved, or require evidence to be given of the second fact before evidence is given of the first fact. (S. 136).

Illustrations.—(c) A is accused of receiving stolen property knowing it to have been stolen. It is proposed to prove that he denied the possession of the property. The relevancy of the denial depends on the identity of the property. The court may, in its discretion, either require the property to be identified before the denial of the possession is proved or permit the denial of the possession to be proved before the property is identified.

(d) It is proposed to prove a fact (A) which is said to have been the cause or effect of the fact in issue. There are several intermediate facts (B, C and D) which must be shown to exist before the fact (A) can be regarded as the cause or effect of the fact in issue. The Court may either permit A to be proved before B, C and D is proved, or may require proof of B, C and D before permitting proof of A.

* This clause should be read with S. 104 and the illustrations attached thereto.

8. (1) **Order of Examinations**.—Witnesses shall be first examined-in-chief, then (if the adverse party so desires) cross examined, then (if the party calling him so desires) re-examined. [S. 138(1)].

(2) **Examination-in-chief**.—The examination of a witness, by the party who calls him is called his *examination in-chief*.

(3) **Cross-examination**.—The examination of a witness by the adverse party is called his *cross-examination*.

(4) **Re-examination**.—The examination of a witness subsequent to the cross-examination by the party who called him is called his *re-examination*. (S. 137).

Note.—The examination of witnesses consists generally of three stages. First of all the witness is examined by the party who calls him ; it is called the examination-in-chief. He is next cross-examined by the adverse party, it is called the cross-examination. Finally he is examined again by the party who called him ; it is called the re-examination.

It is the province of the party by whom the witness is called to examine him in chief for the purpose of eliciting from the witness all the material facts within his knowledge which tend to prove such party's case. Examination-in-chief must relate to relevant facts, [S. 138 (2)]. No leading question can be asked in it. (S. 142).

As soon as the examination-in-chief of a witness who has been called by either party is closed, the other party has a right to cross-examine him. The essence of cross examination is, that it is the interrogation by the advocate of one party of a witness called by his adversary with the object either to obtain from such witness admission favourable to his cause, or to discredit him. Cross-examination is the most effective of all means for

Explain "Examination in-chief," "Cross examination" and "Re-examination." C. U. 1915(b); Bom. 1909(b), 1912 (b) ; Pmj. 1917.

What questions are to be asked in "Examination-in-chief" "Cross-examination" and "Re-examination." C. U. 1915(a), Bom. 1914 (b).

What are the principal rules regarding the kind of questions that may be asked in Examination-in-chief, Cross-examination and Re-examination ? Rom. 1914(b) [Vide Sa. 141, 143, 146 & 154.]

What is the meaning and object of cross-examination ?
 Bom. 1911(b).

What is the nature and object of cross-examination and re-examination ?
 Bom. 1908 (a)

Define Leading question
 All. 1916,
 When are leading questions allowed?
 Bom. 1913(a),
 '21 (b).

What are "leading questions" and why are they so called ?
 Discuss the right of parties to a suit to put leading ques-

extracting truth and exposing falsehood. The objects of cross-examination are to impeach the accuracy, credibility and general value of the evidence given in chief ; to sift the facts already stated by the witness, to detect and expose discrepancies or to elicit suppressed facts which will support the case of the cross-examining party. By it the situation of the witness with respect to the parties and to the subject of litigation, his interest, his motives, inclination and prejudices, his character, his means of obtaining a correct and certain knowledge of the facts to which he bears testimony, the manner in which he has used those means, his powers of discernment, memory and description are all fully investigated and ascertained, and submitted to the consideration of the Jury who have an opportunity of observing his demeanour, and of determining the just cause of his testimony. It is not easy for a witness subjected to this test, to impose on a Court or Jury ; for, however artful the fabrication of falsehood may be, it cannot embrace all the circumstances to which a cross-examination may be extended. Like examination-in-chief, cross-examination must relate to relevant facts ; but unlike re-examination it need not be confined to facts deposed to in the preceding examination. Further it differs from both of them in as much as leading questions can be asked. The range of cross-examination is unlimited, the only circumscribing limits being that it must "relate to relevant facts" (S. 138). Besides questions relating to relevant facts a witness may further be asked in cross-examination question intended to test his veracity, to discover who he is and what is his position in life and to shake his credit by injuring his character. (See S. 146 *post*). The Act, however, in Ss. 139-153 has laid down certain rules limiting the scope of cross-examination. Cross-examination is generally undertaken by the adverse party ; but the court may permit a party to cross-examine his own witness in certain cases. (S. 154).

When the cross-examination of a witness is concluded, the party who called him has the right to re-examine him on all matters arising out of the cross-examination for the purpose of reconciling any discrepancies that may exist between the evidence in the examination-in-chief and that which has been given in cross-examination, or for the purpose of removing or diminishing any suspicion that the cross-examination may have cast on the evidence-in-chief; or to enable the witness to state the whole truth as to matters which have only been partially dealt with in cross-examination. Re-examination must be directed to the explanation of matters referred to in cross-examination (S. 148) and if new matter is by permission of the court introduced in re-examination, the adverse party may further cross-examine upon that matter. No leading question can be asked in re-examination. (S. 142).

tions to witnesses and the circumstances under which they may put. C. U. '12 (a). '10 (a), 1908.

What is the exact scope of re-examination? Bom. 1913 (a)

Scope of cross-examination.—In India, as in England, the accused are entitled in cross-examination to elicit facts in support of their defence from the prosecution witnesses wholly unconnected with the examination-in-chief. In the course of cross examination of this character the defence are entitled to ask leading questions. Under S. 154 of the Evidence Act, the court has the discretion to permit the prosecution to test by way of cross-examination, the veracity of their own witnesses with regard to the unconnected matters elicited by the defence in cross-examination. In the United States, a party has no right to cross-examine any witness, except as to circumstances connected with matters stated in his examination-in-chief and if he wishes to examine him respecting others he must do so by making him his own witness and by calling him as such in the subsequent progress of the cause. (42 Cal. 957):

What is re-examination and its object? Bom. '17 (b)

The prosecution in a criminal case calls a witness to prove a document. Can the defence elicit from him by leading questions in cross-examination, facts favourable to the defence and unconnected with the document? If so, can the prosecution

5. **Directions for examinations.**—The examination-in-chief and cross-examination must relate to relevant facts, but the cross-examination

When cross examine him on the new facts brought out ?

C. U. '20 (b).

Explain—

“Leading question.”

C. U. '15(a),

Bom. '09(b),

Mad. '19 (a).

What do you mean by the expression

“Leading questions” ?

Who can not ask these questions ?

C. U. '25 (b).

For what purposes and at whose instance are former statements of a witness under examination admissible ?

(*Vide* Sa, 145 and 157.)

What are leading questions and when may or may not they be asked ?

C. U. 20(a)

Explain the term “leading

need not be confined to the facts to which the witness testified in his examination-in-chief. The re-examination, shall be directed to the explanation of matters referred to in cross-examination, and, if new matter is by permission of the court, introduced in re-examination, the adverse party may further cross examine upon that matter [S. 138(2)].

✓ 6 (1) **Leading question.**—Any question suggesting the answers which the person putting it wishes or expects to receive is called a *leading question*. (S. 141).

✓ 2) **When leading questions may and may not be asked.**—(a) Leading questions must not, if objected to by the adverse party, be asked in an examination-in-chief or in a re-examination, except with the permission of the court.

(b) The court shall permit leading questions as to matters which are introductory or undisputed or which have in its opinion, been already sufficiently proved. S. 142).

✓ (c) Leading questions may be asked in cross-examination. (S. 143)

Note—A question suggestive of its own answer is called a leading question. A leading question is one which suggests to the witness the answer desired or which embodying a material fact, admits of a conclusive answer by a simple negative or affirmative. (Taylor). A leading question is one which suggests to the witness the answer which it is desired he should give. “A question,” says Bentham, “is a leading one, when it indicates to the witness the real or supposed fact which the examiner expects and desires to have confirmed by the answer. Is not your name so and so ? Do you not reside in such a place ? Are you not in the service of such and such a person ? Have you not lived so many years with him ?

"Leading questions cannot ordinarily be put in examination-in-chief or re-examination, except with the permission of the court which is generally given if they refer to matters which are (i) *introductory* or (ii) *undisputed* or (iii) *sufficiently proved*. Leading questions can be asked in cross-examination. The reason for excluding leading questions from examination-in-chief is obvious. It would enable a party to prepare his story and evolve it in his very words from the mouth of his witnesses in court. It would tend to diminish chances of detection of a concocted story."

7 Cross-examination of person called to produce document.—A person summoned to produce a document does not become a witness by the mere fact that he produces it and cannot be cross-examined unless and until he is called as a witness. (S. 139).

8. Witnesses to character.—Witnesses to character may be cross-examined and re-examined. (S. 140).

9. Cross-examination as to previous statements in writing.—A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question without such writing being shewn to him, or being proved but if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him. (S. 145).

Note.—One of the modes in which, according to the Evidence Act, the credit of a witness may be impeached is by proof of formal statements inconsistent with any part of his evidence which is liable to be contradicted; and this section gives the right to cross-examine a witness on previous statements made by him and reduced into writing * when

questions." State when they may be permitted in examination in chief? Mad. 1915. Bom. 1918(a). 1920(a) What is the procedure to be followed when a witness has to be contradicted by a prior statement made by him in writing? Mad. 1919(a). What is meant by cross-examination? Write short note on the value of cross-examination as a means of discovering truth. C. U. '28(b).

* This section refers only to previous statements made in writing or

those previous statements are relevant to the matter in issue. (19 All. 390).

A witness may be questioned as to his previous written statements for two purposes :—(1) it may be to test his memory ; and the very object would be defeated if the writing were placed in his hand before the questions were asked ; or (2) it may be to contradict him, and here it would be obviously unfair not to give him every opportunity of seeing how the matter really stands. (Norton).

10. Questions lawful in cross-examination.

(1) When a witness is cross-examined, he may in addition to the questions referred to in Sec. 138(2) be asked any question which tend —

(i) to test his veracity,

(ii) to discover who he is and what is his position in life, or

(iii) to shake his credit, by injuring his character, although the answer to such questions might tend directly or indirectly to criminate him or might expose or tend directly or indirectly to expose him to a penalty or forfeiture. (S 146).

In what ways may the credit of a witness be impeached ?
All. 1915,
Mad. 1918(a).
What questions are lawful when put in cross-examination by Counsel of the opposite party ?
Bom. 1915(b).
[See Ss. 145 and 147-153]

Note.—This section gives the cross-examiner a wider power of interrogation than is allowed by S. 138 (2) and says that in addition to the questions that may be asked under the latter section, the witness may be further asked the question mentioned in this section.

(2) If any such question relate to a matter *relevant* to the suit or proceeding, the provisions of Sec. 132 shall apply thereto. (S. 147).

When can the court compel a witness to

Note.—This section as well as the next section apply to questions referred to in Sec. 146. The present section refers

reduced into writing. The mode of contradicting previous verbal statements is pointed out in S. 153, Exception 2.

to "matters *relevant* to the suit or proceeding" while the next section refers to matters *not relevant* to the suit or proceeding."

(3) If any such question relate to a matter *not relevant* to the suit or proceeding except in so far as it affects the credit of the witness by injuring his character, the Court shall decide whether or not the witness shall be compelled to answer it, and may, if it thinks fit, warn the witness what he is not obliged to answer it. In exercising its discretion, the Court shall have regard to the following consideration :—

(a) Such questions are *proper* if they are of such a nature that the truth of the imputation conveyed by them would seriously affect the opinion of the Court as to the credibility of the witness on the matter to which he testifies :

(b) Such questions are *improper* if the imputation which they convey relate to matters so remote in time, or of such a character that the truth of the imputation would not affect or would affect in a slight degree, the opinion of the Court as to the credibility of the witness on the matter to which he testifies :

(c) Such questions are *improper* if there is a great disproportion between the importance of the imputation made against the witness's character and the importance of his evidence :*

(d) The Court may, if it sees fit, draw, from the witness's refusal to answer, the inference that the answer if given would be unfavourable.† (S. 148).

answer questions intended to affect his credit by injuring his character ?
Bom. '14(a).

What questions affecting the credit of a witness by injuring his character are respectively proper and improper ?

* This clause provides that, if the evidence is very unimportant and the imputation on the witness's character very serious, the question is improper and ought not to be allowed.

† This clause is merely a reproduction of ill. (A) to S. 114.

(4) Questions affecting character not to be asked without reasonable ground.—No such question, as is referred to in section 143, ought to be asked, unless the person asking it has reasonable ground for thinking that the imputation, which it conveys, is well-founded. (S. 149).

What provision is made in the Indian Evidence Act to prevent an abuse of the privilege granted to a Counsel to put discrediting question to a witness in cross-examination? Bom. '17(a).

Illustrations.—(a) A barrister is instructed by an attorney or vakil that an important witness is a dakait. This is a reasonable ground for asking the witnesses whether he is a dakait.

(b) A pleader is informed by a person in Court that an important witness is a dakait. The informant, on being questioned by the pleader, gives satisfactory reasons for his statement. This is a reasonable ground for asking the witness whether he is a dakait.

(c) A witness, of whom nothing whatever is known, is asked at random whether he is a dakait. There are here no reasonable grounds for the question.

(d) A witness, of whom nothing whatever is known being questioned as to his mode of life and means of living, gives unsatisfactory answers. This may be a reasonable ground, for asking him if he is a dakait.

What is the power of the court when a question is asked to a witness without reasonable grounds? C.U. '24(a).

(5) Procedure in case of such questions being asked without reasonable grounds.—If the Court is of opinion that any such question was asked without reasonable grounds, it may, if it was asked by any barrister, pleader, vakil or attorney, report the circumstances of the case to the High Court or other authority to which such barrister, pleader, vakil or attorney is subject in the exercise of his profession. (S. 150)

Note.—The object of this section is to prevent the unnecessary raking up of the past history of a witness, when it throws no light whatsoever on the questions at issue in a case. In the course of cross-examination, the temptation is always too great to run down a witness's character; the

Legislature has, therefore, wisely provided ample safeguards for the unfortunate witness and placed wholesome checks on the wily cross-examiner.

11. Exclusion of evidence to contradict answer to questions affecting character of witness.—When a witness has been asked and has answered any question which is relevant to the inquiry *only in so far as it tends to shake his credit by injuring his character** no evidence shall be given to contradict him, but if he answers falsely he may afterwards be charged with giving false evidence. (S. 153).

Illustrations —(a) A claim against an underwriter is resisted on the ground of fraud. The claimant is asked whether, in a former transaction he had not made a fraudulent claim. He denies it. Evidence is offered to show that he did make such claim. The evidence is inadmissible.

(b) A witness is asked whether he was not dismissed from a situation for dishonesty. He denies it. Evidence is offered to show that he was dismissed for dishonesty. The evidence is not admissible.

(c) A affirms that on a certain day he saw B at Lahore. A is asked whether he himself was not on that day at Calcutta. He denies it. Evidence is offered to show that A was on that day at Calcutta. The evidence is admissible *not as contradicting A on a fact which affects his credit*, but as contradicting the alleged fact that B was seen on the day in question in Lahore

[In each of these cases, the witness might if his denial was false, be charged with giving false evidence]

To what extent may a witness be contradicted? Bom. 1898, Mad. '18(2), '91(a).

What evidence of a witness is liable to contradiction? In a civil case are there any restrictions on the questions which may be asked in cross-examination? Has the Judge power to exclude any questions? If so, in what cases? Bom. '18(a).

Under what circumstances can the court interfere with the cross-examination of a witness? Bom. '13 (b). (Vide Ss. 148-152).

* This section is limited to matters which may be introduced under cl (iii) of sec 145 ante. Where a witness deposes to facts which are relevant, evidence may be given in contradiction of what he has stated. But when what he deposes to affect only his credit, no evidence to contradict him can be given for the sole purpose of shaking his credit by injuring character.

Exceptions :— There, are however, two exceptions to the above rule :—

'In what cases does the Evidence Act allow evidence to be given to contradict a witness on matters directed merely to shake his credit ? Give reasons. Mad. '15.

(i) If a witness is asked whether he has been previously convicted of any crime and denies it, evidence may be given of his previous conviction.

(ii) If a witness is asked any question tending to impeach his impartiality and answers it by denying the fact suggested, he may be contradicted. (S. 153) (113)

*Illustration—*A is asked whether his family has not had a blood-fued with the family of B against whom he gives evidence. He denies it. He may be contradicted on the ground that the question tends to impeach his impartiality.

What provision are there in the Indian Evidence Act to protect a witness against improper cross-examination ? Bom. 1913(b). 18 (a)

Note.—It is obvious that questions, asked merely to discredit a witness, introduce matter altogether foreign to the enquiry, and that, if controversy about the matter so introduced were allowed, the court would be occupied with deciding, not the merits of the case but the merits of witness, and that thus any suit might be indefinitely prolonged. It is, therefore, provided by this section, that whenever a witness has answered a question asked merely for the purpose of discrediting him no evidence shall be given in the case to contradict his answer ; the only remedy (suggested in this section, if he answers falsely, is to prosecute him afterwards for giving false evidence. (S. 193 I. P. C.). There are, however, two exceptions to this rule, and these exceptions are allowed because they can easily be proved without lengthening the trial : (1) If a witness is asked whether he has been previously convicted and denies it, the previous conviction may be easily proved (in the manner provided by S. 511 of the Cr. P. Code). (2) If he is asked about, and denies, any fact tending to impeach his impartiality, (as "Are you not the plaintiff's brother ?" or "Have you not received a bribe from the defendant ?" the fact impeaching his impartiality may be proved. (*Cunningham*).

[**Problem.** In an action for breach of promise of marriage, the Counsel for the deft. asked a witness who was called to corroborate the plff.—(1) whether he had not committed perjury at a certain trial 10 yrs. ago? (2) Whether he had not been convicted of perjury? (3) whether his family had not had a blood feud with the family of the deft.? (4) whether he had not accepted a bribe for giving evidence? Are all or which of these questions permissible? If so, and if the witness replies “No,” can any and what evidence be called to contradict him? Bom. 1916 (b).]

12. Indecent and scandalous questions.—The Court *may* forbid any questions or inquiries which it regards as indecent or scandalous, although such questions or inquiries may have some bearing on the questions before the Court unless they relate to facts in issue, or matters necessary to be known in order to determine whether or not the facts in issue existed. (S. 151).

From what questions will a witness be excused or protected by the court? Bom. '12 (b), '17 (b). Mad. '18(a) When a witness is under examination, (a) what questions and inquiries may be forbidden and (b) what questions must be forbidden by the court? Bom. 1892. (Vide Ss. 148 151-152).

Note.—If a woman prosecuted a man for picking her pocket, it would be monstrous to enquire whether she had an illegitimate child ten years before, though circumstances might exist, which might render such an enquiry necessary. For instance, he might owe a grudge to the person against whom the charge was brought on account of circumstances connected with such a transaction, and have invented the charge for that reason.

The result of S. 151 is, that the Court cannot forbid indecent or scandalous questions *if they relate to facts in issue or to matters necessary to be known in order to determine whether or not the facts in issue existed.* If they have, however, merely some bearing on the questions before the Court, the Court has discretion and *may* forbid them.

13. Questions intended to insult or annoy.—The Court *shall* forbid any question which appears to it to be intended to insult or annoy, or

Indicate the nature of questions which even a

willing witness would not be permitted to answer.
C. U. '18 (b).

What is the remedy if a party's own witness turns hostile?
Bom. '17 (b).
Is it open to a party to discredit his own witnesses or to put leading questions to them?
When may a party cross-examine his own witness?
Bom. '14 (b).
Is a party allowed to cross-examine his own witness?
C. U. '28 (b).

What is the difference between a hostile and an adverse witness?
Mad. '19 (b).

which though proper in itself, appears to the Court needlessly offensive in form. (S. 102).

Note.—Sections 148-152 are intended for the protection of a witness against improper cross-examination. Questions must not be framed in needlessly offensive form, which the circumstances of the case do not require or which tend to insult or annoy.

14. Cross-examining one's own witness.—The Court may, in its discretion, permit the person who calls a witness to put any question to him which might be put in cross-examination by the adverse party. (S. 154).

Note.—A witness must be taken to have a bias in favour of the party by whom he is called, and by offering a witness a party is held to recommend him as worthy of credence and so it is not in general open to him to test his credit or impeach his truthfulness. But the rule should be relaxed in certain cases, namely, where the witness turns hostile or unwilling to give evidence. Where a party calling a witness and examining him finds that he is either hostile or unwilling to answer questions put to him, he can with the permission of the Court put leading questions to him (S. 143) or cross-examine him as to the matters mentioned in Ss. 145 and 146 or impeach his credit (S. 155).

A witness who is unfavourable is not necessarily hostile; for a hostile witness is one who from the manner in which he gives his evidence shows that he is not desirous of telling the truth. A party when called by his opponent cannot as of right be treated as hostile, the matter being solely in the direction of the court. When the witness stands in a situation which naturally makes him adverse to the party who desires his testimony, as for example, when a defendant is called as the plaintiff's witness, the party calling the witness is not entitled to cross-examine him as of right in view of the provisions of sec. 154 I. E. Act. The situation

in which a witness stands towards either party does not give the party calling the witness a right to cross-examine him unless the witness's evidence be of such a nature as to make it appear that the witness is unwilling to tell the truth. (49 Cal. 93).

[**Problem.**—"As the propounder of the will is obliged under Sec. 68 of the Indian Evidence Act to call the attesting witness to the will, such witness should be treated as a witness called by the Court and liable to be cross-examined as a matter of right, by the party citing him," Comment. C. U. 21 (b). See *Surendra Krishna Mandal v. Rani Dasi* (47 Cal. 1043). In course of his judgment in that case, Mukherjee, A. C. J. observes :—"It has been maintained before us that as the propounder was obliged under Sec. 68 of the Indian Evidence Act, to call the attesting witness to the will, such witness should be treated as a witness called by the court and liable to be cross-examined at a matter of right, by the party citing him. In our opinion this contention cannot be upheld. Sec. 154 of the Evidence provides that the Court may, in its discretion, permit the person who calls a witness to put any questions to him which might be put in cross-examination by the adverse party. There is in this respect no distinction on principle between an attesting witness whom a party is obliged to call and any other witness whom he may ask of his own choice, but the court may, in the exercise of its discretion, be more easily persuaded in the former case than in the latter. In view of the provision of the Indian Evidence Act, it is thus plain that there is no room for application, in this country of the view taken in the cases of *Bowman v. Bowman*, *Jacson v. Thomson* and *Coles v. Coles* that a necessary witness that is one whom a party is compelled to call and who may therefore be considered rather the witness of the court than of the party as an attesting witness to a will (*Gell v. Gell*) can be discredited as of right by his own side. It is indeed doubtful whether the

principle recognised in these cases, though recently affirmed in *Jones v. Jones* is still good law in England. (See *Price v. Manning*, *Philips v. Davis* per Deane J.) But two important points must be borne in mind *first*, that a witness is considered adverse when, in the opinion of the Judge, he bears a hostile *animus* to the party calling him and not merely when his testimony contradicts his proof, in other words, as Wilde J. remarked in *Coles v. Coles* a hostile witness is one who, from the manner in which he gives his evidence, shows that he is not desirous of telling the truth, and *secondly*, as Lord Campbell, C. J. observed in *Faulkner v. Brine* where a witness is treated as hostile and cross-examined by the party calling him this must be done to discredit the witness altogether and not merely to get rid of part of his testimony" (pp. 1056-57)].

15. Evidence as to matters in writing.—

Any witness may be asked, whilst under examination, whether any contract, grant or other disposition of property, as to which he is giving evidence, was not contained in a document, and if he says, that it was, or if he is about to make any statement as to the contents of any document which in the opinion of the Court, ought to be produced the adverse party may object to such evidence being given until such document is produced, or until facts have been proved which entitled the party who called the witness to give secondary evidence of it. (S. 144).

(2) A witness may, however, give oral evidence of statements made by other persons about the contents of documents if such documents are in themselves relevant facts.

Supposing for instance, that the question is whether A assaulted B. C deposes that he heard A to say to D—"B wrote a letter accusing me of theft, and I will be revenged on him." This statement is relevant, as showing A's motive

for the assault, and evidence may be given of it, though no other evidence is given about the letter.

16. Impeaching credit of witnesses.—(1) The credit of a witness may be impeached in the following ways by the adverse party or with the consent of the Court, by the party who calls him :—

(a) by the evidence of persons who testify that they, from their knowledge of the witness, believe him to be unworthy of credit ;

(b) by proof that the witness has been bribed, or has accepted the offer of a bribe, or has received any other corrupt inducement to give his evidence ,

(c) by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted ; ,

Illustrations.—(a) A sues B for the price of goods sold and delivered to B. C says that A delivered the goods to B. Evidence is offered to show that, on a previous occasion, he said that he had not delivered the goods to B. The evidence is admissible. (b) A is indicted for the murder of B. C says that B, when dying, declared that A had given B the wound of which he died. Evidence is offered to show that on a previous occasion C said that the wound was not given by A or in his presence. The evidence is admissible. (Cf. S. 154 which refers to statements reduced to writing, while the present section refers to statements, verbal or written.)

(d) when a man is prosecuted for rape or an attempt to ravish, it may be shewn that the prosecutrix was of generally immoral character. (S. 155).

(2) A witness declaring another witness to be unworthy of credit may not, upon his examination-in-chief, give reasons for his belief, but he may be

Mention the ways in which the credit of witnesses is allowed to be impeached, with special reference to the circumstances under which the credit of one's own witnesses can be impeached. C. U. '11 (b). Who can impeach the credit of a witness, and how ? Bom. '14 (b), '14 (a), 12 (b), '12 (b), 1898 ; Mad. '19 (a).

In what many ways the credit of a witness may

be impeached/ asked his reasons in cross-examination, and the
 Bom. '14 (a), answers which he gives cannot be contradicted,
 All. '15, though, if they are false, he may afterwards be
 Mad. '18 (a). charged with giving false evidence. (Expl.

[It is clear that but for some such rule, there might be a pitched battle fought over the character of every witness, and that suits would be simply interminable. (*Cunningham*)]

In what way
 the credit of a
 witness may
 be impeached
 by the ad-
 verse party or
 by consent of
 the court by
 the party who
 calls him?
 Punj. '16.
 Compare the
 English Law
 as to impeach-
 ing the credit
 of a witness.
 Mad. '20 (a).
 [See p. 12
supra].

Note—The witness being the medium through which the Court is to arrive at the truth or falsity of the claim or charge in litigation, it is always necessary to ascertain the trustworthiness of this medium. This is the common function of cross-examination which is, however, not in all cases adequate. It is necessary, therefore, that the parties should be empowered to give independent testimony as to the character of the witness with a view to showing that he is unworthy of belief by the Court which may be done in four ways specified in this section.

In addition to the modes of discrediting the testimony of a witness by cross-examination as pointed out in the Exceptions to S. 153, a party can under this section impeach the credit of a witness called by his adversary, or with the consent of the Court by the party who calls him, in the following ways :—(1) By the evidence of other persons who testify that they from their knowledge of the witness, believe him to be unworthy of credit : (2) by proof that the witness has been bribed or has accepted the offer of bribe, or has received any other corrupt inducement to give his evidence . (3) by proof that the witness on former occasions made statements inconsistent with his present evidence ; and (4) in prosecution for rape or attempt to ravish, by adducing evidence to show that the prosecutrix was generally of immoral character.

17. Questions tending to corroborate evidence of relevant facts admissible.—When a witness whom it is intended to corroborate gives

evidence of any relevant fact, he may be questioned as to any other circumstances which he observed at or near to the time or place at which such relevant fact occurred, if the Court is of opinion that such circumstances, if proved, would corroborate the testimony of a witness as to the relevant fact which he testifies. (S. 156.)

Illustration.—A, an accomplice, gives an account of a robbery in which he took part. He describes various incidents unconnected with the robbery which occurred on his way to and from the place where it was committed. Independent evidence of these facts may be given in order to corroborate his evidence as to the robbery itself.

Note.—This and the following section deals with *corroboration* of the testimony of witness. This section provides for the admission of evidence given for the purpose, not of proving a relevant fact but of testing the witness's truthfulness. There is often no better way of doing this than by ascertaining the accuracy of his evidence as to surrounding circumstances, though they are not so immediately connected with the facts of the case as to be themselves relevant. If he is able to give a definite description of the surrounding circumstances, his testimony thereby gains in credit.

18. Former statements of witnesses may be proved to corroborate later testimony as to same facts—In order to corroborate the testimony of a witness, any former statement made by such witness relating to the same fact, at or about the time when the fact took place, or before any authority legally competent to investigate the fact may be proved. (S. 157).

When could the previous statement of a witness be proved in order to corroborate his testimony?
Mad. '19 (a).
What are the modes by which the testimony of a witness can be corroborated under the Evidence Act?
Mad. '20 (a).

Note.—This section indicates another mode of corroboration of the testimony of a witness. This section provides that any former statements made by a witness (1) *at or about the time when the fact in issue took place* or (2) *before any competent authority* may be proved to corroborate his

For what purpose and at whose instance are former statements of a witness under examination admissible? (*Vide* Ss. 245 and 157.)

testimony. Generally the statements made immediately on the occurrence of an event contains truth, for no time has elapsed for concoction to creep in; similarly statements solemnly made in the presence of a legally competent authority bear the impress of truth. Statements like these are, therefore, a legitimate means of corroboration. Under the English law, however, such statements are not generally admissible.

19. What matters may be proved in connection with proved statement relevant under S. 32 or 33.—Whenever any statement, relevant under Section 32 or 33, is proved, all matters may be proved either in order to contradict or to corroborate it, or in order to impeach or confirm the credit of the person by whom it was made, which might have been called as a witness and had denied upon cross examination the truth of the matter suggested. (S. 158).

Is there any and what means of discrediting the depositions of a witness in a prior judicial proceeding? Mad. '18 (b). State the provisions of the Evidence Act regulating the onus of proof as to question regulating the use of documents to refresh the memory of a witness. Mad. '18 (a).

Note.—Ss. 32 and 33 of the Act permit the putting in of certain statements made by persons who cannot be produced and examined as witness. This section provides that in every case in which, under S 32 or 33, a statement made is relevant, the statement may be corroborated or contradicted * or the credit of the person who made it may be impeached or confirmed by any evidence which would have been admissible against that person, had he been called as a witness. The maker of such a statement not being a witness before the Court cannot be examined and cross-examined, and it is therefore all the more just and reasonable that such statement should, so far as possible, be submitted to all the various tests of truth. For instance, if as in illustration (c) to S. 153, the statement of A, admitted under S. 32 or 33, is to the effect that he saw B at Lahore on a certain day, evidence to prove that A was in Calcutta on that

* This section deals with corroboration as well as contradiction while Ss. 156 and 157 relate to corroboration.

day could be given. Similarly evidence to impeach the credit of A might be given in the manner described in S. 153. On the other hand, A's statement may be corroborated by the production of a former statement such as is described in Sec. 157.

20. Refreshing memory.—(1) A witness may, while under examination, refresh his memory by referring to any writing made by himself at the time of the transaction concerning which he is questioned, or so soon afterwards that the Court considers it likely that the transaction was at that time fresh in his memory.

Under what circumstances can a witness refresh his memory from a writing (a) made by himself, (b) made by another? Bom. '12 (a).

(2) The witness may also refer to any such writing made by any other person, and read by the witness within the time aforesaid if when he read it, he knew it to be correct.

(8) An expert may refresh his memory by reference to professional treatises.

(4) When witness may use copy of document to refresh memory.—Whenever a witness may refresh his memory by reference to any document, he may, *with the permission of the Court*, refer to a copy of such document, *provided* the Court be satisfied that there is sufficient reason for the non-production of the original. (S. 159).

What is meant by a witness "refreshing his memory"? What documents may be used for this purpose? Can such documents be subsequently put in and made evidence in the action? If so, how and by whom? Bom. '10(a). (Vide. Ss. 159—161.)

Note.—This section permits a witness to refresh his memory respecting facts about which he speaks, by anything written by himself—except in the case of scientific witness referring to professional treatises—at the time when the fact occurred or immediately thereafter, or at any other time when the fact was fresh in his memory. A witness may also refresh his memory by referring to writing made by any other person very shortly after the date on which the event in question occurred and read by him shortly after the event if when he heard it he knew that the same was correctly stated in writing. He may also for the purpose of refreshing his

What are the conditions to enable a witness to refresh his memory by reference to documents? What is the right of the adverse party as to any writing used to refresh memory? Mad. '17(b).

When may a written memorandum or note-book be used by a witness to refresh his memory? May a copy of an original memorandum be used for that purpose? Is there any difference between the rules of the English and Indian Law in this respect? All, '17
At a trial a witness admits in cross-examination that at home before coming to court he

memory, refer to a copy of any document, to which he might refer, if it were produced, provided that good cause be shewn, to the satisfaction of the Court, for the non-production of the original.

(5) Testimony to facts stated in document.—

A witness may also testify to facts mentioned in any such document, although he has no specific recollection of the facts themselves, if he is sure that the facts were correctly recorded in the document. (S. 160).

Illustration.—A book-keeper may testify to facts recorded by him in books regularly kept in the course of business if he knows that the books were correctly kept, although he has forgotten the particular transactions entered.

Note.—Sec. 160 gives important extension to the rule laid down in the preceding section. A witness may have no recollection of a transaction and may be unable, even with the aid of the document to recall it and yet, from seeing the document or his signature upon it, may be able to speak with positiveness to the occurrence of the transaction. What the witness's evidence in such cases comes to, is this: "I know that signature to be mine, and from seeing the signature, I am positive that the transaction occurred."

6) Right of adverse party as to writing used to refresh memory.—Any writing used for the purpose of refreshing memory under the above provision must be produced and shown to the adverse party if he requires it. Such party may, if he pleases, cross-examine the witness thereupon. (S. 161).*

Note.—The opposite party may look at the writing to see what kind of writing it is in order to check the use of improper documents.

21. Production of documents.—(1) A witness summoned to produce a document shall, if it is in his possession or power, bring it to Court, notwith-

standing any objection which there may be to its production or to its admissibility. The validity of any such objection shall be decided on by the Court. The Court, if it sees fit, may inspect the document, unless it refers to matters of State, or take other evidence to enable it to determine on its admissibility. If for such a purpose it is necessary to cause any document to be translated, the Court may, if it thinks fit, direct the translator to keep the contents secret, unless the document is to be given in evidence; and, if the interpreter disobey such direction, he shall be held to have committed an offence under S. 166 of the Indian Penal Code. (S. 162).

Note.—The summons to produce a document is, like the summons to appear as a witness, of compulsory obligation and must be obeyed by the witness who has no more right to determine whether the document shall be produced than when a person is summoned by the Court to produce a document, if it be in his possession or power, he must bring it to Court, notwithstanding any objection that he may have with regard to its production or admissibility. Having brought it to Court, he may raise his objections to its production or admissibility, the validity of which will be decided by the Court. In order to decide on the validity of the reason that may be offered for withholding the document the Court may inspect the document, unless it refers to matter of State (S. 133) or may take any other evidence about it. If the document happens to be in a language unknown to the Judge, he may get it translated, and call upon the translator to keep its contents secret.

had refreshed his memory by reading certain notes made by himself. Can such notes be called for by cross-examination Counsel? All, '16. What is the procedure to be adopted. when a witness summoned to produce a document pleads privilege? Mad, '16.

(2) **Giving, as evidence, of document called for and produced on notice.**—When a party calls for a document which he has given the other party notice to produce, and such document is produced,

and inspected by the party calling for its production he is bound to give it as evidence if the party producing it requires him to do so. (S 163).

Note—Where a party to a suit calls for a document from the other party and when produced *inspects* the same he is bound to give it as evidence if the other party requires him to do so. The reason for the rule is, that it would give an unconscionable advantage to a party to enable him to pry into the affairs of his adversary, without at the same time subjecting him to the risk of making whatever he inspects evidence for both parties. (*Taylor*)

(3) Effect of refusal to produce a document after notice—When a party refuses to produce, a document which he has had notice to produce, he cannot afterwards use the document as evidence, without the consent of the other party or the order of the Court.* (S. 164).

C. U. '24(a)

Illustration—A sues B on an agreement and gives B notice to produce it. At the trial A calls for the document and B refuses to produce it. A gives secondary evidence of the contents. B seeks to produce the document itself to contradict the secondary evidence given by A, or in order to show that the agreement is not stamped. He cannot do so.

Note.—The section declares that when a party who has been served with a notice to produce a document (under S. 66 *ante*) declines to produce it he will not afterwards be allowed to use it as evidence unless the Court permits or the other party consents to such use. Should he be allowed

*Another consequence of failure to produce is that provided for by Sec. 89 of the Act *viz.*, that the party who has called for the document is relieved from the necessity of proving that it was duly stamped, attested and executed. And in addition, it may also be presumed that the document would, if produced, be unfavourable to the person withholding it. See Sec. 114, *ills. (g) and (h)*. A similar consequence is also provided for by Order XL, R. 15 of the Civil Procedure Code, 1908, when a party refuses to produce a document for inspection (*Cunningham*).

to do so, he would be able to hold back the paper until he saw whether its parol rendering would be favourable or unfavourable to him and thus to obtain an unjust advantage over his opponent.

22. **Judge's power to put questions or order productions**—The Judge may, in order to discover or to obtain proper proof of relevant facts, ask any question he pleases in any form, at any time, of any witness or of the parties, about any fact relevant or irrelevant; and may order the production of any document or thing; and neither parties nor their agents shall be entitled to make any objection to any such question or order, nor, without the leave of the Court to cross-examine any witness upon any answer given in reply to any such question :

What are the powers of a Judge to put questions or order production? Mad. '17 (b).

Provided that—(i) the judgment must be based upon facts declared by this Act to be relevant, and duly proved; and

(ii) this section shall not authorise any Judge to compel any witness to answer any question or to produce any document which such witness would be entitled to refuse to answer or produce under sections 121—131, both inclusive if the question were asked or the document were called for by the adverse party; nor shall the Judge ask any question which it would be improper for any other person to ask under Secs. 148 or 149; nor shall he dispense with primary evidence of any document, except in the cases hereinbefore, excepted. (§. 165).

Note.—It frequently happens that the parties do not, in their questions, elicit all the facts necessary to a sound view of the merits of the case. A plaintiff may have some weak points in his case which he is afraid of betraying and so dexterously avoids, or a defendant may fail to perceive

What is the object of the legislature in empowering the Judge to put any questions to a

witness at any time ?

Mad. '19 (a).

the import of some answer given and allow it to pass uncriticised : in any case it is highly important that the Judge should be armed with full power of enabling him to get at the facts. He may accordingly, subject to conditions laid down in the section, ask any question he pleases, in any form, at any stage of the proceedings, about any ~~matter~~ relevant or irrelevant, and he may order the production of any document or thing. No objection can be taken to any such question or order, nor are the parties entitled, without the court's permission, cross-examine on the answers given.

Can a prisoner's Counsel cross-examine a witness summoned by the Court or by a co-prisoner ?
Bom. 1898

Right to cross-examine witness called by Court.—There is nothing in this section debarring or disqualifying a party to a proceeding from cross-examining any witness called by the Court. All that the section says is that a party to a proceeding should not be allowed to cross-examine a witness upon an answer given by him to a question put by the court, *without the permission of such Court.* (24 Cal. 288). The provisions of this section only forbid the cross-examination, *without the leave of the court*, of any witness upon any answer given in reply to a question asked by the Judge. They apply rather to particular questions put to a witness already before the court than to the whole examination of a witness called by the court. (Field).

What restrictions are imposed on the general power of a Judge to ask questions of a witness ?
Mad. '19(a), '19(b).

Proviso. (i)—The general power given by the section is restricted by this proviso, which declares that the judgment must be based on relevant facts (Ss. 5-55) and those relevant facts must be duly proved (Ss. 56-100). Under this section the Judge, in order to discover or to obtain proper proof of relevant facts may, indeed exercise very wide powers ; but they all pivot upon the ascertainment of relevant facts. He may approach the case from any point of view and is not tied down to the ruts marked out by the parties. He can ask (a) *any question* he pleases ; (b) *in any form* ; (c) *at any time* ; (d) *of any witness or of the parties* ; (e) *about any fact* relevant or irrelevant. But out of the evidence so

brought about, the Judge can only use that which is *relevant* and *duly proved*. The Evidence Act prescribes that the judgment of the court must be based upon facts declared by the Act to be relevant and duly proved and it would be intolerable that the court should decide rights upon suspicions unsupported by testimony. (2 C. W. N. 18, at p. 27).

Proviso. (ii)—There are three exceptions to the very wide powers given to the Judge by this section. These are :—

(1) The Judge cannot compel a witness to answer a question or produce a document which such witness would be entitled to refuse to answer or produce under Ss. 121-131 at the instance of the adverse party.

(2) He cannot ask any question as to credit which it would be improper under Ss. 148-149.

(3) He cannot dispense with primary evidence of any document except where secondary evidence is admissible under S. 65 *ante*.

23. Power of Jury or assessors to put questions.—In cases tried by jury or with assessors, the jury or assessors, may put any questions to the witness, *through or by leave of the Judge* which the Judge himself might put and which he considers proper (S. 166).

CHAPTER XI.—Improper Admission or

Rejection of Evidence. (S. 167).

No new trial or reversal of decision for improper admission or rejection of evidence.—The improper admission or rejection of evidence shall not be ground of itself for a new trial or reversal of any decision in any case, if it shall appear

Comment.
Bom. '15 (a).

to the court before which such objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that, if the rejected evidence had been received, it ought not to have varied the decision.

Analysis—Improper { (a) admission or } of evidence—

is no ground for { a new trial or
reversal of any decision

if the court thinks—

(i) that (*in case of improper admission*) there is sufficient evidence to justify the decision, independently of the evidence objected to and admitted ; or

(ii) that (*in case of improper rejection*) the decision would not have been varied if the rejected evidence had been received.

Note.—The meaning of this section is that the court of appeal or revision will not disturb a decision on the ground of improper admission or rejection of evidence, if, in spite of such evidence, there are sufficient materials in the case to justify the decision. In other words, technical objections will not be allowed to prevail where substantial justice appears to have done. It is only when a case is substantially prejudiced on the merits by defects in procedure or technicalities that there can be retrial of the case or a reversal of its decision. The attainment of justice being the only aim, legal technicalities are, on principle, not allowed to impede the course of judicial proceedings.

